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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~754~~ 25

HOWARD JOSEPH WHITEHILL, APPELLANT,

vs.

WILSON ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

FILED NOVEMBER 5, 1966
PROBABLE JURISDICTION NOTED FEBRUARY 13, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 754

HOWARD JOSEPH WHITEHILL, APPELLANT,

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WILSON ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

INDEX

	Original	Print
Record from the United States District Court for the District of Maryland		
Docket entries	1	1
Complaint for preliminary and permanent injunction and declaratory judgment	3	4
Exhibits A and A-1—Letter from University of Maryland, signed by Charles D. Murphy, Head of the English Department to Mr. Howard J. Whitehill, Jr., dated July 6, 1966 and form, "Certification of Applicant for Public Employment"	10	10
Exhibit B—Reply letter from Joseph Whitehill to Charles D. Murphy, dated July 11, 1966	12	12
Exhibit B-1—Letter from University of Maryland, signed by Charles D. Murphy, Head of the English Department to Mr. Howard Whitehill, Jr., dated July 18, 1966	13	13

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 30, 1967

	Original	Print
Record from the United States District Court for the District of Maryland—Continued		
Complaint for preliminary and permanent injunction and declaratory judgment—Continued		
Exhibit C—Opinion of Attorney General, C. Ferdinand Sybert, dated April 8, 1960, "Subversive Activities Act, Loyalty Pledge Requirement of Act Is Applicable to Persons Rendering Occasional Instructional Services for Compensation In University's Formal Instructional Program—'Employee' Defined"	14	14
Exhibit D—Sedition and Subversive Activities—Article 85A, Sections 1, 10, 11, 13 and 17	17	17
Application of plaintiff for convening of three judge court	20	21
Motion of plaintiff for preliminary injunction	22	22
Memorandum of points and authorities	23	23
Amendment to complaint for preliminary and permanent injunction and declaratory judgment	26	25
Defendants motion to dismiss	29	26
Memorandum in support (excerpts)	31	27
Transcript of hearing, September 1, 1966	53	29
Appearances	53	29
Letter of Joseph Whitehill to Charles D. Murphy, dated July 11, 1966 introduced at hearing	100	60
Opinion, Winter, J.	103	63
Concurring opinion, Sobeloff, J.	118	75
Order granting defendant's motion to dismiss	121	77
Notice of appeal to the Supreme Court of the United States	122	78
Clerk's certificate (omitted in printing)	126	81
Order noting probable jurisdiction	127	81

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

THREE-JUDGE COURT

Civil Docket 17564

Instituted 19 August, 1966

HOWARD JOSEPH WHITEHILL, JR.,

vs.

WILSON ELKINS, President, University of Maryland, Administration Office; Board of Regents, University of Maryland, Administration Office; J. JEROME FRAMPTON, JR., President, State Board of Education.

For Plaintiff: Sanford Jay Rosen, Arnold M. Weiner, Elsbeth Levy Bothe, Jos. S. Kaufman, Lee M. Miller.

For Defendant: Thomas B. Finan, Robert C. Murphy, Loring E. Hawes, Julius A. Romano.

Basis of action: Constitutionality of 1st and 14th Amendments; (Md. Subversive Activities Act of 1949).

Date	*Plaintiff's Account*	*Received*	*Disbursed*
1966			
/19	Jos. S. Kaufman filing fee	15.00	
/22/66	Tr. U.S. Clerk's fee		15.00
13-66	Sanford J. Rosen, filing fee, Notice of Appeal	5.00	

14-66 Tr. U.S.-Clerk's fee 5.00

Abstract of Costs				*Receipts, Remarks, etc.*
To Whom Due		*Amount*		
Plaintiff:	Attorney	20.00		
	Clerk	15.00	pd.	$35.00
Defendants:	Attorney	20.00		20.00
				$55.00 s/r/9-8-66P.

[fol. 2]

DOCKET ENTRIES

Date		
1966		
Aug. 19	(1)	Complaint, Exhibits A, A1, B, B1, C, and D, filed. (Service admitted)
" "	(2)	Application of Plaintiff to convene Three-Judge Court, filed. (Service admitted)
" "	(3)	Motion of Plaintiff for Preliminary Injunction and Memorandum in support thereof, filed. (Service admitted)
" 23	(4)	Notification and Request (Thomsen, C.J.) of filing of proceedings and for designation of a Three-Judge Court, filed.
" "	(5)	Designation of Haynsworth, Jr., C. J., Fourth Circuit, of Honorable Simon E. Sobeloff and Harrison L. Winter, Circuit Judges, and Honorable Roszel C. Thomsen, District Judge, to constitute a Three-Judge Court, filed.
" 26	(6)	AMENDED COMPLAINT, filed. (copy served)
" 31	(7)	Motion of Defendants to Dismiss and Memorandum in support thereof, filed.

Date 1966		
Sept.	1	— Hearing on Motion of Defendant to Dismiss before Simon E. Sobeloff and Harrison L. Winter, Circuit Judges, and Thomsen, C. J.
"	"	— Argued and held sub-curia.
"	8	(8) Opinion (Sobeloff and Winter Circuit Judges and Thomsen, Chief Judge United States District Court), filed. [Stamp] Micro Filmed Date Sep 8 1966
"	"	(9) Order (Sobeloff and Winter Circuit Judges and Thomsen, Chief Judge United States District Court) that Defendants' motion to dismiss be and is hereby granted; Complaint dismissed with costs to defendants, filed. [Stamp] Micro Filmed Date Sep 8 1966 (notices mailed 9/8/66 w.l.b, jr.)
"	13	(10) Notice of Appeal of Plaintiff and designation as to contents of Record on Appeal, filed.
Oct.	14	(11) Transcript of Proceedings before the Court on September 1, 1966, filed.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

HOWARD JOSEPH WHITEHILL, JR., 201 Cedar Street, Chestertown, Maryland, Plaintiff,

v.

WILSON ELKINS, President, University of Maryland, Administration Office, Regents Drive, College Park, Maryland,

BOARD OF REGENTS, University of Maryland, Administration Office, Regents Drive, College Park, Maryland,

J. JEROME FRAMPTOM, JR., President, State Board of Education, State Office Building, 301 West Preston Street, Baltimore, Maryland, Defendants.

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION AND DECLARATORY JUDGMENT—Filed August 19, 1966

1. Jurisdiction of this Court is invoked under the First and Fourteenth Amendments to the United States Constitution; 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3), 2201, and 2202; and further pursuant to 28 U.S.C. §§ 2281 and 2284.

2. This action is brought by the Plaintiff, Howard Joseph Whitehill, Jr., individually and on behalf of others similarly situated in position, for the purposes of enjoining enforcement of, and having this Court declare unconstitutional and void, the provisions of Article 85A, § 1 through 19, of the Annotated Code of Maryland (1957), otherwise known as the Subversive Activities Act of 1949, and more popularly called the "Ober Law", which, in its pertinent provisions applicable to this Plaintiff, as appear in Section 13, therein, which requires a statement of em-

[fol. 4] ployees, and Section 1, which sets forth definitions therein, and as further appears in Section 10 et seq., relating to alleged "loyalty", has the effect of preventing and prohibiting an individual from employment and receipt of compensation as a state employee unless and until he signs the oath required by such provisions.

3. The Plaintiff herein, Howard Joseph Whitehill, Jr., is presently a resident of Chestertown, Maryland and is engaged in teaching creative writing at the Johns Hopkins University and in the writing of works of fiction and of non-fiction and is a practicing member of the Religious Society of Friends, known also as Quakers.

4. The defendants, and each of them are respectively Wilson Elkins, the President of the University of Maryland; the Board of Regents of the University; and J. Jerome Framptom, Jr., Chairman of the State Board of Education, and they are fully and completely responsible for supervising, directing and otherwise controlling the enforcement of the activities and actions set forth in this complaint.

5. As a consequence of an understanding with the representatives of the University of Maryland at College Park, Maryland, the Plaintiff executed a written contract, a copy of which was not retained by him, for his appointment as a visiting lecturer in English during the academic year 1966-67, to be paid $7,000 on a ten month basis; the Plaintiff agreed to spend one day a week at the College Park Campus each semester, teaching two creative writing classes in 75-minute sessions, and making additional conference time available.

6. By a letter dated July 6, 1966 and signed by Dr. Charles D. Murphy, Head of the English Department of the University of Maryland, at College Park, the Plaintiff [fol. 5] received the contract and additional papers, includ-

ing what was denominated a "Certification of Applicant for Public Employment," which contained a loyalty oath, and which he was instructed had to be signed as a condition precedent to his appointment.

7. Attached hereto and made a part hereof as Exhibit "A" is the letter of July 6, 1966 and the "Certification of Applicant for Public Employment," which the Plaintiff had been directed to sign in order that his contract may be consummated and fulfilled by the representatives of the defendants and by the defendants themselves.

8. The Plaintiff executed the contract and, by letter of July 11, 1966, a copy of which is attached hereto and made a part hereof in Exhibit "B", he mailed it to Dr. Murphy, declining in a separate letter, enclosed therewith, however, to execute the "Certification of Applicant for Public Employment." Dr. Murphy, by letter of July 18, 1966, a copy of which is attached hereto and made a part hereof in Exhibit "B", advised the Plaintiff that the University of Maryland would not accept his services without such Certification first having been executed and filed by him.

9. The Plaintiff falls within the definitions of "state employee" given by the Attorney General of the State of Maryland to the University and filed by him in litigation, and thus falls within the class of persons required to execute such loyalty oath as a condition of employment by the State. Attached hereto and made a part hereof as Exhibit "C" is a copy of the opinion of the Attorney General, 45 *Reports and Official Opinions of the Attorney General* 187, dated April 8, 1960, defining state "employee" as including persons similarly situated as the Plaintiff.

10. The required loyalty oath is unconstitutional; it infringes upon the Plaintiff's rights to free and unfettered belief and opinion; its vagueness violates the requirements [fol. 6] of due process; it unconstitutionally shifts a burden to Plaintiff which instead rests upon the defendants;

Plaintiff should not be required to sign such oath and will not do so; his refusal to sign the oath is also a matter of conscience and your Plaintiff rests his refusal upon his fundamental rights of free speech, freedom of religion, due process and equal protection of law; and further the defendants' demand that the Plaintiff sign such loyalty oath is an unconstitutional exaction of Plaintiff's constitutional rights in exchange for employment; nevertheless, the Plaintiff will not sign such oath and as a result, the defendants and their agents or representatives will continue to refuse to execute the contract that had been agreed to by the parties, all to the damage, detriment and loss of constitutional rights of the Plaintiff.

11. The Plaintiff has attached hereto and made a part hereof in Exhibit "D", Sections 10 and 11 and 13 and 17 of the Subversive Activities Act, all of which provisions, regulations and procedures have been followed and executed and will continue to be followed and executed by the defendants and their agents, servants and employees; also included is the definitions Section, Section 1.

12. The said Sections of the said law have been interpreted by the State of Maryland and have been determined by the Court of Appeals of that State to be constitutional in the case of Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (1950).

13. As a consequence of the action of the defendants or such servants, agents or employees as are supervised by them, the Plaintiff and all others similarly situated in position, have been deprived and will continue to be deprived of their rights under the First and Fourteenth Amendments to the Constitution, and their rights under the Supremacy Clause of the Constitution of the United States; and such deprivation will continue unless the defendants are enjoined and restrained as prayed for herein.

[fol. 7] 14. The said damage and injury done to the Plaintiff and to all others similarly situated in position, by the defendants, is irreparable, and as a consequence thereof, there is no adequate remedy at law.

15. Under the contract that the Plaintiff signed, his teaching duties were to have begun in the week of September 19, 1966, and unless the relief prayed is granted with expedition, the Plaintiff will be irretrievably deprived of his constitutional rights as aforesaid.

Wherefore the Plaintiff prays as follows:

1. That as promptly as the business of the Court may permit, this Court should convene a Statutory Court of three judges, pursuant to Title 28, United States Code, Sections 2281 and 2284, for the purposes of granting a prompt and expedited hearing herein, and a determination of this cause.

2. That this Court should adjudge and declare to be in violation of the Constitution of the United States and as void for vagueness and otherwise void, unconstitutional and illegal, all provisions of the Statutes of the State of Maryland appearing in Article 85A, § 1, et seq., which have the effect of compelling the Plaintiff, as a visiting lecturer, and all others similarly situated, to sign a loyalty oath in the form prescribed and in accordance with the said Statute and policies and actions of the defendants herein, before being employed by the state or receiving state funds.

3. That this Court should issue a preliminary and permanent injunction restraining and prohibiting the defendants and those agents, servants and employees under their supervision and control and all other persons in active concert with them who receive actual notice of the Order of Court by personal service or otherwise, from enforcing, carrying out, executing, administering the provisions of Article 85A relating to statements required thereunder [fol. 8] for employment by the State or any agency thereof,

or any policies, practices or actions taken pursuant thereto; and further that the said parties should be restrained and enjoined from otherwise preventing the consummation of the Plaintiff's contract with the University of Maryland because of Plaintiff's assertion of his constitutional rights and his consequent refusal to conform with requirements of Article 85A, § 1 et seq., and his like refusal to conform with the policies, practices and actions of the defendants taken pursuant thereto.

4. That this Court should grant the Plaintiff, and all others similarly situated in position such other and further relief as to the Court may seem just and proper.

Howard Joseph Whitehill, Jr., Plaintiff.

Sanford Jay Rosen, 500 West Baltimore Street, Baltimore, Maryland 21201, Telephone: 955-7145;

Arnold M. Weiner, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, Telephone: 727-2800;

Elsbeth Levy Bothe, 41 West Preston Street, Baltimore, Maryland 21201, Telephone: 727-4425;

Joseph S. Kaufman, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, Telephone: 727-2800,

Attorneys for Plaintiff.

Service admitted—8/19/66, Robert C. Murphy, Dep. Att. Gen.

[fol. 9] *Duly sworn to by Howard Joseph Whitehill, Jr., jurat omitted in printing.*

Certificate of Service (omitted in printing).

[fol. 10]

"EXHIBIT 'A'" TO COMPLAINT

UNIVERSITY OF MARYLAND
COLLEGE PARK 20742

COLLEGE OF ARTS AND SCIENCES
DEPARTMENT OF
ENGLISH LANGUAGE AND LITERATURE

July 6, 1966

Mr. Howard J. Whitehill, Jr.
201 Cedar Street
Chestertown, Maryland

Dear Mr. Whitehill:

I apologize for the delay, but I have just received formal notice of the approval of Rudd Fleming's leave. I am glad therefore that I can now offer you an appointment as Visiting Lecturer (part time) in this department for 1966-67. The salary for this appointment would be $7,000 on a ten months basis.

The teaching program would be the one we agreed on when you visited the department. You would teach two creative writing classes each semester. Each class would meet for a 75-minute session (9:30 to 10:45 and 12:30 to 1:45) on one day a week, either Tuesday or Thursday as you prefer; and it is understood (since these courses usually meet two days a week) that conference time would be made available to the students at other hours on the day of the class meeting.

I am enclosing the contract and several other papers you need to fill out or sign if you wish to accept the appointment. I regret that it is apparently impossible on an appointment of this kind to avoid the tax withholding procedure.

I will be grateful if you can return the papers within a week, since I hope to clear up appointment formalities be-

fore I get away for a vacation. Please do not hesitate to call me collect if you have any question about the appointment. If you wish to have the students buy textbooks for the course, we will send in the order when we have the name of the book(s).

Sincerely yours,

/s/ CHARLES D. MURPHY
Charles D. Murphy
Head

CDM:vgp
Enclosure

[fol. 11]

"EXHIBIT 'A-1'" TO COMPLAINT

CERTIFICATION OF APPLICANT
FOR PUBLIC EMPLOYMENT

Required by Law (Art. 85A, Paragraph 13,
Annotated Code of Maryland, 1957)

"I, ..., do hereby cer-
(Print Name—including middle initial)
tify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.

"I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."

Date .....

Signature .....
(Name—including middle initial)

[fol. 12]

"Exhibit 'B'" to Complaint

July 11, 1966

Charles D. Murphy, Ph.D., Head
Department of English
College of Arts and Sciences
The University of Maryland
College Park, Maryland 20742

Dear Mr. Murphy:

Thank you for your letter of July 6. I am delighted to accept the appointment as Visiting Lecturer for next year, following the schedule you describe.

I return to you enclosed:

One Curriculum Vitae
Three completed Faculty Information Sheets
Three signed Appointment Contracts
Two completed Federal Withholding Cards
Another, independent letter to you, eyes only.

You will, I hope, be pleased to learn that Hiram Haydn has accepted my article, "Samuel Taylor Coleridge: Prisoner and Prophet of System," for publication in *The American Scholar*. The piece started as an amiable academic hoax, testing whether I was able to write the critical jargon in pursuit of an outrageous thesis: That Coleridge was the father of modern information theory. But the farther I went, the more persuasive became the parallels, and it ended as a very serious affair.

With continuing thanks for your courtesy, I am

Very truly yours,

Joseph Whitehill

[fol. 13]

"EXHIBIT 'B-1'" TO COMPLAINT

UNIVERSITY OF MARYLAND

COLLEGE PARK 20742

COLLEGE OF ARTS AND SCIENCES
DEPARTMENT OF ENGLISH LANGUAGE
AND LITERATURE

July 18, 1966

Mr. Howard J. Whitehill, Jr.
201 Cedar Street
Chestertown, Maryland

Dear Mr. Whitehill:

Thank you for your full statement of your views and reservations about the "certification of applicant for public employment" which is required for appointments at this university and which reads: "I, _____, do hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence."

I am sure you understand that at this stage the formalities of the appointment have not been completed; and I have been informed by university officials that unless the certification is signed it is not possible under the law for the President of the University to give the approval that would be required to make the appointment effective. For this same reason, your proposal to teach without remuneration until a court decision is rendered is not an arrangement we can accept.

You will recall that when you visited my office I pointed out that such a certification was required, and that in my

letter offering you an appointment I enclosed the certification form as one of the "papers you need to fill out or sign if you wish to accept the appointment." Since this condition was explicitly stated, I am regretfully obliged to take your declining to sign the certification as a decision not to accept the appointment that was offered.

Sincerely yours,

/s/ CHARLES D. MURPHY
Charles D. Murphy
Head

CDM:amm

cc: Vice President Hornbake
Dean Charles Manning

[fol. 14]

"EXHIBIT 'C'" TO COMPLAINT

SUBVERSIVE ACTIVITIES ACT

LOYALTY PLEDGE REQUIREMENT OF ACT IS APPLICABLE TO PERSONS RENDERING OCCASIONAL INSTRUCTIONAL SERVICES FOR COMPENSATION, IN UNIVERSITY'S FORMAL INSTRUCTIONAL PROGRAM—"EMPLOYEE" DEFINED.

April 8, 1960.

Dr. Wilson H. Elkins,
President and Executive Officer,
University of Maryland.

You have asked whether the loyalty pledge provisions of the Subversive Activities Act of 1949 are applicable to persons who, while not appearing in the University Budget, and not listed as faculty members, render occasional instructional services for compensation in connection with certain formal credit bearing courses offered by the University. You state that the primary employment of such individuals is not with the University; and that the instruc-

tional service which they render in the University's program is much like a speaker's contribution, except that such service is rendered in association with, and as an integral part of a formal University course, and the individual may be asked to return semester by semester, or year by year. You further advise us that such persons are compensated for such instructional services by the University on a so-called "one-pay card" basis.

The Act in question, codified as Sections 1-19 of Article 85A, Annotated Code of Maryland (1957 Edition), provides in Section 10 that no subversive person as defined in the Act shall be eligible for "employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this State . . .". Section 11 provides, *inter alia,* that every board, department or other agency of the State which appoints or employs any persons, including teachers and other employees of any public educational institution in this State, shall establish procedures to ascertain whether such [fol. 15] person is a subversive person; and that in securing facts necessary to such determination the applicant shall be required to sign a statement containing answers to such inquiries as may be material. Section 13 provides in substance that all persons in the employ of the State shall be required to execute a statement that he or she is not a subversive person.

By letter of June 16, 1949, we advised you that it was unnecessary to secure loyalty pledges under this Act from persons invited to the University Campus for the specific purpose of delivering one or two lectures for a stipulated sum of money. In that instance, the speaker's contribution was in no way related to the University's formal instructional program and it was our opinion that such person was not, in the legal sense contemplated by the statute, an appointee or employee of the State.

It is, however, our opinion that the individuals now in question are employees of the University during that period of time that their services are engaged by the University in connection with its formal instructional program. Recently, in *Keitz v. National Paving Company*, 214 Md. 479, our Court of Appeals held:

> "... there are at least five criteria that may be considered in determining the question whether the relationship of master and servant exists. These are: (1) the selection and engagement of the servant, (2) the payment of wages, (3) the power to discharge, (4) the power to control the servant's conduct, (5) and whether the work is a part of the regular business of the employer. Standing alone, none of these indicia, excepting (4), seems controlling in the determination as to whether such relationship exists. The decisive test in determining whether the relation of master and servant exists is whether the employer has the right to control and direct the servant in the performance of his work and in the manner in which the work is to be done. It will be noted from the above, [fol. 16] it is not the manner in which the alleged master actually exercised his authority to control and direct the action of the servant which controls, but it is his right to do so that is important."

We conclude, therefore, that such individuals must execute the loyalty oath prior to undertaking instructional service with the University. If you determine that such individuals have previously executed the loyalty oath as required in their primary employment with another State agency, or with an institution receiving State aid, no duplication will be necessary before they may be permitted to serve the University in the stated manner.

C. FERDINAND SYBERT, *Attorney General.*

ROBERT C. MURPHY, *Assistant Attorney General.*

[fol. 17]

"Exhibit 'D'" to Complaint

ARTICLE 85A

Sedition and Subversive Activities

§1. *Definitions.*

For the purposes of this article:

"Organization" means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force or violence.

"Foreign subversive organization" means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of, the United States, or of the State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control

of any foreign government, organization or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments of world federations, unions or governments to be effected through constitutional means.

"Foreign government" means the government of any country or nation other than the government of the United States or of one of the states thereof.

"Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, ~~or~~ of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization.

[fol. 18] *Loyalty*

§10. *Subversive person not eligible for governmental office.*

No subversive person, as defined in this article, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this State, or of any county, municipality, or other political subdivision of this State.

§11. *Rules and regulations to determine loyalty—In general.*

Every person and every board, commission, council, department, court or other agency of the State of Maryland or any political subdivision thereof, who or which ap-

points or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain before any person, including teachers and other employees of any public educational institution in this State, is appointed or employed, that he or she as the case may be, is not a subversive person, and that there are no reasonable grounds to believe such persons are subversive persons. In the event such reasonable grounds exist, he or she as the case may be shall not be appointed or employed. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury.

§13. Statement of Employees.

Every person, who on June 1, 1949 shall be in the employ of the State of Maryland or of any political subdivision thereof, other than those now holding elective office shall be required on or before August 1, 1949, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article, namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this article. Such statement shall be prepared and execution required by the State Commissioner of Personnel for

all persons whose employment is subject to the provisions of Article 64A of the Annotated Code of Maryland and by the city service commission of Baltimore for all employees whose employment is subject to the provisions of §§ 142 to 156 of the Baltimore City Chapter and by every person and every board, commission, council, department, court or other agency of the State of Maryland or any [fol. 19] political subdivision thereof responsible for the supervision of other employees, for employees under its jurisdiction. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this article shall immediately be discharged.

§17. *False statements constitute perjury.*

Every written statement made pursuant to this article by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this article, or (c) under oath in any hearing conducted by any agency of the State, or of any of its political subdivisions, pursuant to this article, or (d) in any written statement by an applicant for appointment or employment or by an employee in any State aid or private institution of learning in this State, intended to determine whether or not such applicant or employee is a subversive person as defined in this article, which statement contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury in Article 27, § 439 of the Annotated Code.

[fol. 20]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

[Title omitted]

APPLICATION OF PLAINTIFF FOR CONVENING OF THREE JUDGE COURT—Filed August 19, 1966

On grounds set forth in the verified Complaint filed herein, seeking a preliminary and permanent injunction and judgment declaring unconstitutional the provisions of the Statutes of the State of Maryland in Article 85A which compelled the Plaintiff to conform with such Statutes in order to commence his employment with the State by signing a statement of purported "loyalty", Plaintiff makes application for hearing of this cause and the motion for preliminary injunction, before a Three Judge District Court, in accordance with and pursuant to Title 28, Sections 2281 and 2284 of the United States Code; and Plaintiff further requests that the Chief Judge of the United States Court of Appeals for the Fourth Circuit be notified [fol. 21] pursuant to § 2284, Title 28, United States Code, of the presentation of Plaintiff's application for injunction, in order that the necessary designation of judges for said Court may be made.

Sanford Jay Rosen, 500 West Baltimore Street, Baltimore, Maryland 21201, Telephone: 955-7145;

Arnold M. Weiner, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, Telephone: 727-2800;

Elsbeth Levy Bothe, 41 West Preston Street, Baltimore, Maryland 21201, Telephone: 727-4425;

Joseph S. Kaufman, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, Telephone: 727-2800,

Attorneys for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 22]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

[Title omitted]

MOTION OF PLAINTIFF FOR PRELIMINARY INJUNCTION—
Filed August 19, 1966

The Plaintiff herein, on grounds set forth in the verified Complaint for Preliminary and Permanent Injunction and Declaratory Judgment and for reasons set forth therein, prays that this Court enter a preliminary injunction in accordance with the prayers therein on the grounds that, unless such injunction is issued in the form therein prayed irreparable damage will be done to the Plaintiff and that the Plaintiff has no adequate remedy at law, all of which is more specifically set forth in the Complaint contemporaneously filed herewith and which is prayed to be made a part hereof.

Wherefore, the Plaintiff prays that this Court enter a [fol. 23] Preliminary Injunction in the form prayed in the verified Complaint herein.

Sanford Jay Rosen, Arnold M. Weiner, Elsbeth Levy Bothe, Joseph S. Kaufman, Attorneys for Plaintiff.

MEMORANDUM OF POINTS AND AUTHORITIES

The Plaintiff's fundamental position can be stated succinctly:

First, the instant Act has been authoritatively construed and declared to be constitutional by the Court of Appeals for the State of Maryland in *Shub* v. *Simpson*, 196 Md. 177, 76 A.2d 332 (1950).

Second, in *Gerende* v. *Board of Supervisors*, 341 U.S. 56 (1951), a case involving the application of the Act at bar to candidates for political office, the Supreme Court affirmed the Court of Appeals for the State of Maryland, see 197 Md. 282, 78 A.2d 660 (1951), but restricted its ruling to a specified representation of the Attorney General of Maryland with respect to the language of the oath to be required under the Act.

Third, until very recently, the loyalty oath went further than the Attorney General's representation to the Supreme Court by demanding an averment that the signatory is not "a subversive person as defined by law."

Fourth, shortly after the Supreme Court's April 18, 1966 decision in *Elfbrandt* v. *Russell*, 384 U.S. 11, the Attorney [fol. 24] General caused the oath to be redrafted and given in its present form, see Exhibit "A" to the Complaint, which, but for the addition of the certification with respect to perjury, appears to conform to the representation made to the Supreme Court in *Gerende*.

Fifth, although it would appear that the oath before this Court generally fulfills the Attorney General's representation, this fact is not dispositive nor significant to the question at bar. Since *Gerende*, the Supreme Court has had occasion to pass upon a statute which has the precise and exact language of the Maryland definition of "subversive person" appearing in Section 1, Article 85A of the Maryland Code Annotated (1957). It struck down

that statute as unconstitutionally vague in *Baggett* v. *Bullitt*, 377 U.S. 366 (1964). And just this year, it voided the Arizona loyalty oath on the same ground. *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966); see also, *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961). These cases control the issues, and the instant oath and statutes can find no present support in *Gerende*. See the dissenting opinion in *Baggett* v. *Bullitt*, 377 U.S. at 382, where Justice Clark lamented: "It is unfortunate that Gerende is overruled so quickly." And there can be no valid distinction between the statutes that guided the defendants here and those that guided the defendants in *Baggett* v. *Bullitt*. See 377 U.S. at 382 n. In addition, the requirement of a loyalty oath as a condition to public employment of this plaintiff, a Quaker who is barred by conscience and religion from executing such oaths, is an invalid condition on public employment in violation of the freedoms of religion, speech, and belief protected by the First and Fourteenth Amendments to the Constitution. See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

[fol. 25] There is no constitutional basis for the oath at bar; nor for the actions of the defendants in requiring its affirmation as a condition to the Plaintiff's employment. By granting this Motion, the Court will have firmly settled that fact.

Sanford Jay Rosen, Arnold M. Weiner, Elsbeth Levy Bothe, Joseph S. Kaufman, Attorneys for Plaintiff.

Certificate of Service (omitted in printing).

[fol. 26]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

[Title omitted]

AMENDMENT TO COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION AND DECLARATORY JUDGMENT—Filed August 26, 1966

The Plaintiff, Howard Joseph Whitehill, Jr., by Sanford Jay Rosen, Esq., Arnold M. Weiner, Esq., Elsbeth Levy Bothe, Esq., and Joseph S. Kaufman, Esq., his attorneys, amends the Complaint by adding Paragraph 16 thereto, which reads as follows:

16. Not only the required "Certification of Applicant for Public Employment" but also the statute, particularly those provisions alleged in Paragraph 11 of the Complaint filed on August 8, 1966, pursuant to which such certification is given, is unconstitutional for the reasons set forth in Paragraph 10 of the Complaint and under the constitutional provisions set forth in Paragraph 13 of the Complaint; in addition, [fol. 27] such certifications and the statutory provisions pursuant to which they are given are also unconstitutional in that they constitute a prohibited Bill of Attainder in violation of Article I, Section 10 of the United States Constitution and further because, in violation of due process of law, they infringe upon the freedom expression, belief and conscience by denying appointment to persons who refuse to sign such certifications without affording them a hearing.

Sanford Jay Rosen, 500 West Baltimore Street, Baltimore, Maryland 21201, 955-7145;

Arnold M. Weiner, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, 727-2800;

Elsbeth Levy Bothe, 41 West Preston Street, Baltimore, Maryland 21201, 727-4425;

Joseph S. Kaufman, 1215 Maryland National Bank Bldg., Baltimore, Maryland 21202, 727-2800;

Lee M. Miller, 11th Floor, One Charles Center, Baltimore, Maryland 21202, 752-6100,

Attorneys for Plaintiff.

[fol. 28] Certificate of Service (omitted in printing).

[fol. 29]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

[Title omitted]

MOTION TO DISMISS—Filed August 31, 1966

The Defendants move the Court as follows:

To Dismiss the Complaint for failure to state a claim upon which relief can be granted.

Thomas B. Finan, Attorney General of Maryland;

Robert C. Murphy, Deputy Attorney General;

Loring E. Hawes, Assistant Attorney General;

Julius A. Romano, Assistant Attorney General, 1200 One Charles Center, Baltimore, Maryland 21201, 539-5413,

Attorneys for Defendants.

[fol. 30] Certificate of Service (omitted in printing).

[fol. 31]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Civil Action No. 17564

[Title omitted]

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS—
Filed August 31, 1966

As a statutory precondition to employment with the State of Maryland, or any of its political subdivisions, all persons seeking such employment (with certain exceptions not here pertinent) are required to execute a statement under oath entitled "Certification of Applicant for Public Employment", which reads as follows:

> "I, ..., do hereby
> (Print Name—including Middle Initial)
> certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27 of the Annotated Code of Maryland (1957 edition)."

[fol. 32] The University of Maryland, an agency of the State of Maryland, declined to employ Plaintiff Whitehill as a Visiting Lecturer in a formal credit-bearing course solely by reason of his refusal to subscribe to the aforegoing Certification. As such Certification has its roots in the provisions of the Subversive Activities Act of 1949, commonly known as the "Ober Act", and particularly Sections 10-13 thereof, Plaintiff's Complaint for Preliminary and Permanent Injunction and Declaratory Judgment seeks a judgment declaring unconstitutional all pro-

visions of the Act in question which have the effect of compelling him, as a condition of employment with the State, to sign the cited Certification (sometimes denominated a "Loyalty Oath") in the form above prescribed. Plaintiff asserts that the statement in question violates, *inter alia*, his constitutional guarantees of freedom of speech, association and religion, and, additionally, that said Certification is unconstitutionally vague in violation of the due process requirement of the Fourteenth Amendment, and that the statement ("Loyalty Oath") and the statutory provisions pursuant to which it is required are also unconstitutional as a prohibited Bill of Attainder in violation of Article 1, Section 10, of the United States Constitution.

It is the State's position that it may, pursuant to its police power, require execution of the "Certification of Applicant for Public Employment", in the form above prescribed, as a condition of public employment, and that such requirement does not run counter to any provision of the Constitution of the United States.

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[fol. 53]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

No. 17564 Civil

HOWARD JOSEPH WHITEHILL, JR.,

vs.

WILSON ELKINS, President, University of Maryland, Administration Office; BOARD OF REGENTS, University of Maryland, Administration Office; J. JEROME FRAMPTON, JR., President, State Board of Education.

Transcript of Hearing—September 1, 1966

Baltimore, Maryland

The above-entitled case came on for hearing before The Honorable Simon E. Sobeloff, United States Circuit Judge, The Honorable Harrison L. Winter, United States Circuit Judge, and The Honorable Roszel C. Thomsen, Chief Judge, United States District Court for the District of Maryland, at 10:00 o'clock a.m.

APPEARANCES:

For the Plaintiff:

Sanford Jay Rosen, Arnold M. Weiner, Elsbeth Levy Bothe.

For the Defendants:

Robert C. Murphy, Loring E. Hawes, Julius A. Romano.

[fol. 54]

TRANSCRIPT OF PROCEEDINGS

The Clerk: The matter pending before the Court: Civil Action No. 17564, Howard Joseph Whitehill, Jr. vs. Wilson Elkins, President, University of Maryland, et al. Hearing on constitutionality of First and Fourteenth Amendments.

Attorneys for the plaintiff: Sanford Jay Rosen, Arnold M. Weiner, Mrs. Elsbeth Levy Bothe.

Attorneys for the defendants: Robert C. Murphy, Loring E. Hawes, Julius A. Romano.

Mr. Murphy: May it please the Court, we have a motion to dismiss filed to the complaint and I don't know whether it's proper to argue that at this point or just what the Court's pleasure might be.

Judge Sobeloff: I suppose since you are the movant, we will hear from you first.

Mr. Murphy: May it please the Court, the complaint in this case as filed by Professor Whitehill, as Your Honor knows, under Maryland law, as a precondition of public employment, all applicants are required to certify what is commonly known as a loyalty oath, more properly called, I think, a loyalty pledge. The actual name given to it is "Certification of Applicant for Public Employment."

That certification, the one that is presently involved before the Court, is that: "I, ..., do hereby [fol. 55] certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence." The certification is required under the penalties of perjury.

Professor Whitehill and the University of Maryland were in contractual negotiations to employ Professor Whitehill. The University would have employed the Professor but for his refusal to execute the loyalty pledge.

As a result of that refusal, the Professor has filed the instant action for declaratory judgment or an injunction

to declare the provisions of the Subversive Activities Act of 1949, commonly called the Maryland Ober Law, unconstitutional, together with those statutes which compel the execution of the loyalty certification.

At this point, I might say, to digress for a moment, in Paragraph 8 of the plaintiff's complaint, reference is made to correspondence between himself and the University concerning their contractual relationship.

In Paragraph 8, the complaint alleges that the Professor's reasons for declining to sign the Maryland certification were contained in a separate letter. That letter has not been included as an exhibit in the complaint. I believe it's an inadvertence and my brothers have no objection to having it included, and it sets forth in three-page detail [fol. 56] the Professor's reasons for declining to sign the oath.

Judge Sobeloff: I suppose there is no objection.

Mr. Weiner: There is no objection.

Mr. Murphy: I wonder if the Court will want to suspend long enough to read that letter. I think it's somewhat significant.

Judge Sobeloff: All right, sir.

(Document handed to the Court by the Clerk.)

Judge Winter: I think you may continue, Mr. Murphy.

Mr. Murphy: The grounds assigned by the plaintiff for seeking to have the Ober Law declared unconstitutional are basically those of freedom of speech, association, religion, unconstitutional vagueness, Bill of Attainder, and I might add at this point that it appears from the memorandum of the petitioner that they have abandoned the religious claim. I see nothing in there in support of the religious claim and I believe that is possible, although our motion to dismiss goes into the religious contentions of the plaintiff.

I might say also that there is nothing in the Maryland certification whereby the Professor is required to swear.

It simply is a certification. It's not basically an oath; it's loosely referred to as an oath and traditionally, they've been referring to similar statements as oaths, but I think [fol. 57] technically it is not that. It is simply a certification under the penalties of perjury.

Of course, the State takes the position that loyalty certification is entirely proper as part of the State's exercise of its police power and it does not run counter to any constitutional guarantees whatsoever.

Very briefly, if Your Honors please,—I think you're all familiar with the legislative and historical background of the Ober Law, but briefly, to familiarize Your Honors again with it, the General Assembly of Maryland at its 1947 session proposed an amendment to the Constitution to prohibit those individuals who advocated violent overthrow of the Government, State or Federal, from holding public office of any kind, elective or appointive, in the State of Maryland.

That amendment was approved by the people by a vote of 202,000 to 84,000 in 1948 and it became Section 11 of Article 15 of the Maryland Constitution.

In that same year, there was a special session of the General Assembly of Maryland, at which time Senate Joint Resolution No. 2 was passed, directing the Governor to appoint a Committee on Subversive Activities to study the laws of the United States and the several states and to prepare a legislative program for the protection of democratic principles of government and ideals in this State. [fol. 58] That Commission was appointed; it became known as the Commission on Subversive Activities, with Frank B. Ober as its Chairman.

The Commission reported; its report covered over 115 pages, together with a proposed draft of a bill. The Legislature basically enacted the substance of the recommendations of the Ober Commission and that is now the Subversive Activities Act of 1949, Chapter 86 of the Acts of 1949.

As the Court also knows, that Act contains a very extensive preamble, numerous recitals by the Legislature of its findings with respect to the subversive activities threat to this country at that time.

Very briefly, it stated that there existed a worldwide Communist movement, under the domination of a foreign power, and it set forth the objectives of that movement, with which we are, I am sure, all familiar.

It goes on to say that there are other subversive groups, other than the Communist Party, which have such objectives. It sets forth that one of the methods adopted by subversive persons and organizations render it imperative that the loyalty of persons entering the public employment of the State of Maryland be definitely established.

One of the methods again cited by the preamble was the infiltration into places or positions in the Government in an effort to overthrow it.

[fol. 59] The Act itself is divided into two sections, one under the heading of "Sedition", which is not directly involved here, and the other under the heading of "Loyalty", which is.

The sections under "Sedition" give the basic definitions of subversive person, subversive organization and so forth, and set forth and make it a felony to commit certain subversive type of—or engage in certain subversive type activity, as defined in Section 3 of the Act. It imposes upon the Attorney-General the duty of enforcement, as well as other officials.

The sections of the Act under the "Loyalty" subheading basically proscribe any individual who is a subversive person as defined by law from eligibility for employment with the State or any of its political subdivisions.

The individuals employed by the State as of June 1, 1949 were required to take the oath in the form set out in Section 13, which I think was drawn at that time. As to new employees, prospective new employees, they were required to execute an oath, which, as a practical matter, was basically the same as that executed by the employees

in 1949. As the Court knows, that oath was changed around 1951.

The point I'm trying to make is that new employees are signing the same form of oath as were former employees.

[fol. 60] Section 15 of the Act requires a loyalty pledge from certain elective public officers, or individuals seeking public office as a condition to have their names included on the ballot.

There is a very broad severability clause contained in Section 18 of the Act.

Now, in pursuance of the statutory mandate, the plaintiff was required to sign the certification that I have just alluded to in the form as is stated in our memorandum and as I have just stated here.

In our judgment, it is this certification, not any other certification, but this certification which is involved in this case, together with any statutes that may compel execution of it. Nothing else is involved.

I believe there is an effort here to strike down the entire Act. We don't feel that the plaintiff has standing to attack the entire Act. He simply has declined to execute the certification, and that is all that is really directly involved at this time.

Judge Winter: Mr. Murphy, could you explain to me what is presently the Attorney-General's position on the form of certification which you are requiring? Clearly, it is not nearly as broad as that which is provided for in the Act, and I think you stated that as a factual matter, around 1950 or 1951, this shortened form began to be used, is that [fol. 61] correct?

Mr. Murphy: That was the outgrowth of the case of Shub vs. Simpson in the Court of Appeals of Maryland and Gerende vs. Board of Supervisors of Elections in the Supreme Court of the United States, a judicial construction of what was required. I was about to come to that, Your Honor.

Judge Winter: Of course, the Supreme Court of the United States said they read the Shub case as saying that only the shortened form of oath was required.

I find it a little difficult to reach the same conclusion, reading the Shub case, just on my own, but be that as it may, has only the shortened form of oath been used constantly since 1950 or 1951?

Mr. Murphy: Well, there are two forms of oath, Your Honor, that have been used since '51, and they are basically the same except that the one that preceded May of '66 stated that: I am not a subversive person as defined by law, namely, that I am not a person who is engaged in one way or another in the attempt to overthrow the Government of the United States. They used the words "subversive person as defined by law" but then did not proceed to use the definition—

Judge Winter: The definition provided by the statute.

Mr. Murphy: —of Section 1. They used the definition [fol. 62] that was approved by the Supreme Court, the effect of which, in my judgment, is a judicial amendment of the term "subversive person" in Article 85A of the Code of Maryland. The Supreme Court has clearly treated it that way, and to dispel any doubt that the Supreme Court did not know what was before it at the time, the brief of the Attorney-General before the Supreme Court in the Gerende case states just what is involved.

It will just take a moment. Page 15 of the State's brief in the Supreme Court in the Gerende case says: "It thus appears that not only is the Ober Law a tightly and carefully drawn statute but that it has received a scrupulously restricted construction by the Court of Appeals which limits its impact to persons committing or advocating acts directly affected or connected with the violent overthrow of the Government."

Again on Page 25 of the State's brief: "The appellees, again calling to the attention of the Court that the Ober Law is a carefully and tightly drawn law, carefully limited by the Court of Appeals of Maryland, respectfully suggest

the following is the true state of the law on this subject," and then it proceeds to set this forth.

There is no question that the argument of the Attorney-General before the Supreme Court was predicated on the basis of a judicial construction much narrower than the [fol. 63] Section 1 and Section 13 definition of a subversive person.

Judge Winter: Would you go so far as to say that the Attorney-General would concede that the oath as literally prescribed by the statute could not be required under some decisions of the Supreme Court?

Mr. Murphy: Yes. Yes, sir.

Judge Winter: In other words, that if you attempted to have a person swear or affirm or certify under penalties of perjury that he was not a subversive person, that that definition would be unconstitutionally broad?

Mr. Murphy: Under Baggett vs. Bullitt, it would be, yes, sir, no question about that.

Judge Thomsen: Now, since that, in May 1966, you made an amendment to the certificate.

Mr. Murphy: That was a result of Elfbrandt.

Judge Thomsen: As a result of the Elfbrandt case, you softened it a little bit from even what the Supreme Court had theretofore approved, is that it, by taking out—

Mr. Murphy: Yes, Your Honor.

Judge Thomsen: —the second clause?

Mr. Murphy: Just mere knowing membership, under the Elfbrandt decision, is not sufficient. It was somewhat vague and it's even possible that the State could not require such a pledge.

Judge Sobeloff: Is it your view that the Gerende deci- [fol. 64] sion was modified by Elfbrandt?

Mr. Murphy: Oh, definitely not, Your Honor. Neither Baggett or Bullitt or Elfbrandt purport to overrule Gerende. As a matter of fact, they both carefully preserve it, in our judgment.

Judge Winter: The majority in Bullitt say that they are not overruling it; they are distinguishing it.

Mr. Murphy: That's correct.

Judge Winter: Of course, the dissenters say the majority is overruling it. Then in Elfbrandt, the majority is silent on Gerende and the dissenters do not say that they have overruled it but they, I think, make somewhat of a passing remark that it is hard to see how the majority could have reached that decision in the light of Gerende and some other cases.

Mr. Murphy: That's what we think. We say that actually in those two cases, there is support for the continual vitality of Gerende. I don't think there is any question about it, and if I could develop into that point and make a—

Judge Winter: To prevail, you do not have to argue that Elfbrandt supports Gerende; all you have to do is to say it does not adversely affect it.

Mr. Murphy: I agree, Your Honor, but I think that the impact of the decision is such that it does support [fol. 65] Gerende and I would like to use it affirmatively, rather than simply trying to guard against it.

Going back to 1950 in the Maryland Court of Appeals case of Shub vs. Simpson, that was a broad-based constitutional attack on the Ober Law. It had all the contentions that are present in this case, violation of free speech, constitutional vagueness.

The Court there, after noting all the factual recitals in the preamble of the Act and finding justification for the basis—of the necessity for the passage of the Act, went on to say that it is—referring to its purpose, "That it is to prevent infiltration in our state, county or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government by force or violence." It was that phrase that indicated in the Court of Appeals' mind the total scope of the required loyalty pledge.

The Supreme Court, as we just mentioned, in the Gerende case,—which certainly enjoys something rather unusual nowadays, unanimity in the Supreme Court—stated

very briefly that: "We read this decision to hold that to obtain a place on the Maryland ballot, a candidate need only make oath that he is not a person who is engaged in one way or another in the attempt to overthrow the government by force or violence, and that he is not knowingly a member of [fol. 66] an organization engaged in such an attempt."

That latter phrase has since been stricken from the Maryland loyalty pledge, based on Elfbrandt, but that is not the certification that the plaintiff was asked to sign. He has been asked to sign that very brief certification that he disavows any intention to overthrow the Government of the United States, the State or the county.

Judge Sobeloff: But does your alteration in the form of the oath made in May after the Elfbrandt decision indicate that in your view, Elfbrandt narrowed the possible scope of the oath as approved in Gerende?

Mr. Murphy: Yes. I would say, Your Honor, out of an abundance of caution—it's not at all clear, but out of an abundance of caution, we struck that last phrase out. It didn't add a whole lot, in our judgment.

There was much confusion between Bullitt and Baggett and Elfbrandt. If Your Honors recall, Bullitt and Baggett was written by Mr. Justice White. He led the dissenters, the three dissenters in Elfbrandt, so even between the Court, I'm not entirely sure that they all agreed on what they were saying, but again, out of an abundance of caution—we wouldn't concede that it was necessary but out of an abundance of caution, we did strike it.

Again I do point, and I think with some impact, to the fact that the Attorney-General of Maryland did argue be- [fol. 67] fore the Supreme Court—perhaps you can't get it out of the Gerende decision itself—that the judicial construction of the definition of a subversive person in the Maryland Act was such that all that was required was the oath that we now have before the Court, that and that alone.

I think the basic thrust or the principal thrust of the petitioner's argument is on unconstitutional vagueness. He

finds a great deal of solace in Bullitt and Baggett. It's true that the Washington loyalty oath, which was struck down in that case, contained the identical definition of a subversive person as is contained in the Maryland Act.

Section 1 of the Maryland Act and the Washington oath that was struck down are identical. The difference, of course, is that we do not use since Gerende, since 1951, the definition of a subversive person contained in the Act.

Again, I come back to what's really involved here. It's the certification that the Professor was asked to sign, not some other certification, that and that alone, and again we say on the question of unconstitutional vagueness, that this Court has to look no further than Gerende, which withstood an attack on constitutional vagueness. You have to go no further, and since Gerende, the allusions to Gerende in Cramp and Alder are such, in our mind, that again say they have continuing vitality.

No case, certainly not expressly or by any implication, [fol. 68] has ever overruled Gerende. In the last three years, the Court of Appeals has had these two cases, Bullitt and Baggett and Elfbrandt, right squarely before them. If they intended to overrule Gerende, they wouldn't have attempted to distinguish it.

As you recall, in Footnote 7 of Bullitt, they went to great pains to distinguish it, so that I say, or the State says that it has continuing vitality.

Basically, in determining whether a loyalty oath is unconstitutionally vague, the test seems to be whether it is set out in "terms susceptible of objective measurement." That was the test that was employed in Cramp; it was restated in Bullitt and Baggett.

Again in the Baggett case, there was an inference to the effect that had the Washington oath been based on violent overthrow of the Government or advocacy of violent overthrow of the Government directly that it would have been—it would have met the test of "terms susceptible of objective measurement."

The Alder case cited in the State's memorandum in support of its motion to dismiss clearly supports the nonvagueness of the Maryland oath. The definition there of a subversive organization was "one that teaches and advocates the overthrow of the government by force or violence." It's true that that case was back in 1952 but it's [fol. 69] been many times cited by the Supreme Court and never been overruled.

I might, on the question of constitutional vagueness, Your Honors, draw attention to the judicial construction of the Smith Act, approved by the Supreme Court of the United States in Dennis vs. U. S. That was another case where it was argued that the Smith Act advocacy provisions were vague. The Supreme Court interpreted them in a fashion to make them constitutional, so that it was advocacy of action for the accomplishment of the overthrow of an organized government which they construed the criminal provisions to be in that case, and again in Baggett, they refer to Dennis and say that that judicial construction by the Supreme Court is still valid.

The only vice in Elfbrandt, as we could see, was the fact that the oath there proscribed mere knowing membership in a subversive organization. The Court said, you need something more; you have to show some affirmative act.

Judge Winter: They were faced with the possibility that an organization may have subversive purposes and nonsubversive purposes, and in effect, didn't they say that if you are going to make membership in such an organization a disqualification, you have got to require not only that they know of the subversive purposes but that they subscribe to the subversive purposes, to guard against the possibility, well, they may think that the subversive pur- [fol. 70] poses are not effective and they are in favor of the nonsubversive purposes and they join the organization and assist it and support it for nonsubversive reasons?

Mr. Murphy: I think that's precisely correct, Your Honor. That is our understanding of it.

On the question of constitutional vagueness, I again come back to the very oath that's involved. No other oath is involved here. It has the sanction of a Supreme Court decision and any infirmities that might have been contained in it by reason of Elfbrandt have been removed. This is the oath that the State of Maryland asks its prospective public employees to take.

Judge Winter: Coming back to the oath itself, what do you think the phrase "in one way or another" means?

Mr. Murphy: I think it probably means in any way, or by any available means. I think it means in one way or another, precisely what it says. It's unfortunate that the English language lacks the precision which perhaps we might like it to have, but I think it means just that: In one way or the other, in any way.

Judge Sobeloff: Could it mean by paying dues to an organization?

Mr. Murphy: I'm sorry, Your Honor?

Judge Sobeloff: Could it mean by paying dues to an organization?

[fol. 71] Mr. Murphy: That's kind of a passive act. I think paying dues to an organization would not be sufficient.

Judge Sobeloff: Would it be unreasonable to interpret that as a meaning then?

Mr. Murphy: I think, in my judgment, it would, Your Honor.

Judge Sobeloff: But under Elfbrandt, that would not be enough to proscribe the person, would it?

Mr. Murphy: That's right. Simply—

Judge Sobeloff: Now, if you take that view, could a rational person interpret the words "in one way or another" as including some of the things which Elfbrandt says may not be included in the oath?

Mr. Murphy: I think he could, Your Honor. I think it would be fishing to find some confusion in a simple statement that I am not engaged in one way or another in the attempt to overthrow the government by force or

violence. The key word, in my judgment, is "attempt," "engaged in the attempt."

If you look at Black's Dictionary for the definition of the word "attempt," it says: "Attempt means an intent combined with an act falling short of the thing intended," so that perhaps the word "attempt" would mean the intent to overthrow by force or violence, coupled with an act in furtherance of that intent.

[fol. 72] Judge Sobeloff: What I am asking you to address yourself to—and I am really unclear about it; maybe you can help us—is the phrase "in one way or another" any less vague than the things that Justice White condemned in the Washington case?

Mr. Murphy: I don't think it's vague at all, Your Honor. The Supreme Court didn't find it vague in Gerende.

Judge Sobeloff: You say that "in one way or another" may include payment of dues to an organization.

Mr. Murphy: No, I don't say that.

Judge Winter: No, I think he said the other.

Judge Sobeloff: I see.

Mr. Murphy: I don't say that.

Judge Thomsen: It would not be enough; you would have to have intent. It would be if you had intent but not unless you had intent.

Judge Sobeloff: Could a person reading the oath and with those words, reasonably so interpret it?

Mr. Murphy: We argue that he can't. We argue that—

Judge Sobeloff: That he can or cannot?

Mr. Murphy: That mere dues paying would be prohibited by this?

Judge Thomsen: Mere dues paying without intent, you [fol. 73] said.

Mr. Murphy: Yes, sir.

Judge Sobeloff: You say that that would not be enough to proscribe the person?

Mr. Murphy: That's right.

Judge Sobeloff: But I am asking you whether you think a reasonable person might interpret the words the

other way, even though you do not agree with that interpretation?

Mr. Murphy: Well, if we take the reasonable person, I would say that he would have to say to himself that he is not engaged in the attempt to overthrow the Government simply because he pays dues to an organization which may be subversive. I think that's an unreasonable—

Judge Sobeloff: You think that would be clear to him?

Mr. Murphy: It would to me, and perhaps I'm reasonable.

Judge Sobeloff: I would amend by striking out the word "perhaps."

Mr. Murphy: I think that this oath is certainly not susceptible to an undefined variety of guiltless but knowing behavior, which was talked about in Elfbrandt and in Baggett, an undefined variety of guiltless but knowing behavior.

[fol. 74] A person who is engaged in an attempt is not guilty. He's guilty if he is engaged in an attempt to overthrow the government.

We're not simply talking of advocacy of discussion. This is advocacy of action, at the least. This is the distinction that the Supreme Court made in the Dennis case. They said that the Smith oath did not simply mean passive advocacy or abstract advocacy, or even just plain discussion. It was an advocacy of action in the Dennis case which saved that provision from the vice of unconstitutional vagueness.

Certainly our certification is far clearer, in my judgment, than the Smith Act provision, which the Supreme Court expressly saved in Baggett. Again we are limited to the precision of the English language, but if this doesn't carry the day, then I don't know what could possibly be used to do so.

Judge Sobeloff: Has the Keyishan case been set down for argument in the Supreme Court?

Mr. Murphy: Your Honor, I know that they have noted probable jurisdiction. Perhaps Professor Rosen knows.

Judge Sobeloff: They did that last January, did they not? When did they note—

Mr. Rosen: I believe it was in June or July probable jurisdiction was noted?

Judge Sobeloff: But no date has been set?

[fol. 75] Mr. Rosen: No date for argument.

Mr. Murphy: I'm told, Your Honor, by Mr. Romano that he talked to Mr. Davis at the Supreme Court and they expect to have argument in November. We'll be glad to suspend the proceedings until that time, if Your Honors would like.

Judge Sobeloff: What happens to Mr. Whitehill in the meantime? I suppose Mr. Whitehill would be agreeable, too, if you would let him teach in the meantime.

Mr. Murphy: In his letter which we have just put in as an exhibit, he says he doesn't really need the money, and I think the thrust of the letter is actually something of a conspiratorial plot to set up a case to have this thing argued. He really has no personal interest in it. Apparently, he's abandoned—

Judge Sobeloff: Would he be permitted to—

Mr. Murphy: No.

Judge Sobeloff: Even if the wages were withheld, would he be permitted to teach?

Mr. Murphy: Not in my judgment, Your Honor. We consider this a prerequisite, a statutory prerequisite that no one can waive other than the Legislature.

Judge Sobeloff: So the delay is no solution from his point of view.

Mr. Murphy: No, but it is from ours.

Judge Sobeloff: Yes, I understand.

[fol. 76] Mr. Murphy: Your Honors, I'd like to pass very briefly to the free speech aspects of the plaintiff's complaint. There, I think it's certainly axiomatic to say that the right of free speech is hardly an absolute right, that it must give and bend to reasonable regulations of the State which do not unduly infringe that freedom.

No less than three cases in the Supreme Court, all of which are cited in our motion, support the proposition

that the State can condition public employment upon a reasonable loyalty certification: Garner, American Communications Association vs. Douds, Alder, and even Gerende implicitly. Baggett and Bullitt recognizes that proposition also, as does Cramp vs. Board of Public Instruction, two very late cases.

I don't think there is any doubt that the State can condition its employment by requiring—or by prohibiting such employment to those people who do what this oath says: Engage in the attempt to overthrow the government. Certainly, anyone so engaged would not be a fit candidate for public employment.

All this regulation does is to weed out from public employment those individuals who, if employed, would work toward the overthrow of the government.

We are not proscribing free speech. There is nothing in this oath that relates to speech at all. It's conduct; con- [fol. 77] duct, not speech.

I think the petitioner here would find great reliance in Speiser vs. Randall, a case in 1958 in the Supreme Court.

Judge Winter: Excuse me, Mr. Murphy. Except that if you had somebody who was going around making public lectures advocating forceful revolution or violent revolution, would not that be engaged in one way or another in the attempt?

Mr. Murphy: I think very definitely, Your Honor, very definitely.

In Speiser vs. Randall, the Supreme Court there struck down a loyalty oath which was required as a condition for eligibility for a veteran's tax exemption. It was a rather rambling opinion; I have read it two or three times without understanding it too well, but it's a far different situation than we have here, and the Speiser Court was careful to point out that there was a large distinction between what it was doing in that case and in the loyalty certification cases.

It expressly stated, referring to Garner, Gerende and Douds: "In these cases, however, there was no attempt

directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. The principal aim of those [fol. 78] statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be used to the detriment of the public."

I think there is a clear, clear distinction between the Speiser situation and the situation in Garner, Gerende and Douds. Certainly if it is not clear, Konigsberg vs. State Bar of California, a case in 1961 cited in our motion, makes it clear that the Speiser principle is limited to where there was an intent to penalize certain beliefs.

There, as the Court knows, California's right to deny admission to the Bar of an individual seeking such admission was upheld where he declined to answer the Bar Committee's inquiries as to whether he was a Communist. The Court in Konigsberg stated: "Speiser was explicitly limited so as not to reach cases where, as here, there is no showing of an attempt to penalize political beliefs," so I think the distinction is certainly quite clear.

The freedom of religion aspects of the plaintiff's complaint have been covered somewhat briefly in our motion to dismiss. I won't go into them here, if Your Honors please, because it appears to have been abandoned.

Similarly, the question as to whether the loyalty certification and the statute compelling it in the Ober Law is a prohibited Bill of Attainder has been completely and totally answered in the Garner case, a far more difficult [fol. 79] case than our present one. In Garner, we were dealing with past loyalty. Our oath is totally prospective. It was upheld in Garner.

Garner remains the law, and the question of Bill of Attainder was involved in the case now pending in the Supreme Court of the United States, to be argued in November, the Keyishan case where the New York three-Judge Court found the Fineberg and associated laws of New York not to be Bills of Attainder. We have no difficulty with that point here, Your Honors.

Finally, we would draw the Court's attention to the fact that the Defendant Frampton, as the President of the State Board of Education, is not a proper party in this case. He exercises absolutely no direction or control of the University, which is an automatic unit of our Government, the management of which is vested totally in the Board of Regents, which is a proper party.

In our motion, Your Honors, we would conclude here with—

Judge Winter: Mr. Frampton is not ex officio a member of the Board of Regents, is he?

Mr. Murphy: No, he is not, Your Honor.

We would conclude by again saying—perhaps getting back to basics, sometimes which we lose sight of in this maze of refined thinking through the Supreme Court's numerous [fol. 80] cases on vagueness—that the Maryland loyalty certification serves a very limited end. It simply provides a means where the State seeks to prevent people from working for it who are doing what this oath says, who are engaged in the attempt to overthrow the Government.

It appears that the plaintiff in reality is challenging the right of the State to condition public employment. It's certainly not couched in that language but I think that's what it really boils down to. Does a person who wants to work for the State and who may be engaged in the effort to overthrow it have a right, a constitutional right, perhaps supported by First Amendment guarantees, to do that very thing? I hope not. I think if that is so, then there has been a large change in constitutional law in the last five years.

We would respectfully state that in our judgment, the complaint fails to state a cause of action and that it should be dismissed.

Judge Sobeloff: Thank you, sir.

Judge Winter: Thank you, Mr. Murphy.

Mr. Rosen: Your Honors.

Judge Sobeloff: Mr. Rosen.

Mr. Rosen: Judge Winter asked what particular certification the State now demands. That particular certification, of course, is attached to the plaintiff's complaint as [fol. 81] Exhibit A-1. As Attorney-General Murphy indicated, it differs from the one that was used by the University up to May 3, 1966 in some details.

If you will, Your Honors, I think it would be appropriate if the Court—

Judge Sobeloff: Why are we concerned about the former oath? Let us assume that it was objectionable,—

Mr. Rosen: All right.

Judge Sobeloff: —is that the question before us today?

Mr. Rosen: I think that is only a part of the question before this Court, Your Honor, but it is the most essential part. We are concerned with the former oath because the Attorney-General and the University makes its defense based upon Gerende, the 1951 case in the Supreme Court in which, according to the Attorney-General, the Court upheld a specific oath, or an oath in a specific form.

In the light of Elfbrandt, the Attorney-General then revised the oath. We submit the Attorney-General had no power to revise the oath.

Judge Winter: Assuming that he had no power to revise the oath, Mr. Rosen, where does that get you? Let us assume that the part of the pre-May 3, 1966 oath which said that he was not a subversive person, namely, with whatever definition, let us say that that was unconstitutional. Under [fol. 82] the severability clause in the Ober Act, are we not left then with the oath which is being administered?

What I am saying is, in other words, to prevail, do you not have to sustain the attack on the exact language which was sought to be extracted from Mr. Whitehill in this case?

Mr. Rosen: No, Your Honor, I don't think so. First of all, the certification that the Attorney-General uses now refers the affiant directly to Section 13, which, despite the severability clause, speaks of membership, as well as being

a subversive person. It also formerly referred the affiant to the entire Act containing all of the various definitions.

In Baggett and Bullitt, the Court—

Judge Winter: You say refers to Section 13. All it does is under the title "Certification of Applicant for Public Employment" say "Required by Law" and then they cite Article 85A, but can't we construe that as meaning simply to the extent validly required by Section 13?

Mr. Rosen: For one thing, the reasonable person reading Section 13 wouldn't know that. For another thing, he wouldn't know it until there were—

Judge Winter: The reasonable person only reads what he is going to sign,—

Mr. Rosen: No, I don't think so, Your Honor.

[fol. 83] Judge Winter: —and what he is going to sign does not have the language of Section 13.

Mr. Rosen: Judge Winter, I think a reasonable person reads the entire statute. If he's signing a statute that renders him liable to a perjury conviction for false swearing and the certification on its face refers him to a statute, I think a reasonable person will read the statute, and besides, I don't see how the Attorney-General can take advantage of the severability clause, as the Attorney-General. That's a judicial act, or it involves a judicial act of construing the statute in the light of the Supreme Court's latest decisions, whereas the Supreme Court in Gerende, reading the Court of Appeals' decision in Shub said, this is what the Court of Appeals of Maryland said this Act means so far as the certification is concerned.

It means, one, a man must say that in one way or another —whatever that means now—he is not engaged in the attempt to overthrow the Government, and he is not knowingly a member of such an organization, in essence.

Now, it's clear that under Elfbrandt, that is no longer good, yet the dispositive gloss placed upon the oath requirement by the highest Court of the State still keeps that section in. I don't see how the Attorney-General can take it out by himself.

In addition, in Baggett, you will recall, as we indicate in [fol. 84] our trial memorandum, Justice White in Footnote 7, which itself is rather obscure, didn't quote the term "in one way or another," which we submit, Your Honors, is patently vague.

Judge Thomsen: That has been approved by the Supreme Court, has it not, specifically in Gerende,—

Mr. Rosen: That's right—

Judge Thomsen: —"in one way or another"?

Mr. Rosen: —but we contend that there is an indication in Baggett that the Supreme Court has thought better of the phrase "in one way or another" and that if faced with the case would delete it—not delete it; would strike such an oath or statute requiring such an oath as being unconstitutionally vague.

Judge Sobeloff: And yet the author of the Baggett decision insists that Gerende is still law.

Mr. Rosen: He didn't insist, Your Honor. He distinguishes Baggett, and he said, we didn't do in Gerende what we are now doing in Baggett, and I think the indications are that if faced with the statute again, or the oath, which has to be read in the light of its statutory gloss as interpreted by the highest Court of the State, they wouldn't uphold it. It's the same statute that the Court faced in Baggett.

[fol. 85] It is the same statute that the Court faced in Baggett, and despite the fact that the oath in Baggett did actually put these provisions on the back, that is the definitional provisions on the back of the certification provided, we do not think that is required here.

The authority for giving the oath will be read by reasonable people, people who take oaths very seriously and consider seriously the fact that they are letting themselves open to prosecutions for perjury. The Court made very clear its concern with this opening of oneself for prosecution for perjury in the Baggett decision. In several cases it discusses the possibility of this problem, the fact that

prosecutors are likely to be reasonable is not sufficient to save a vague statute which provides for such prosecution.

But basically, Your Honors, we agree with the Attorney General and the University that the fundamental issue in this case is, what does Gerende mean? Does it still stand? And it is our fundamental position that in the light of the Supreme Court decisions in Elfbrandt and in Baggett, that Gerende can no longer be seen to stand; that at the very least, the Court has indicated its displeasure with two of the aspects of the oath, on vagueness grounds, vagueness and broadness grounds, that it seemed to find acceptable in the Gerende decision itself.

[fol. 86] Actually, Your Honors, I think that question has revealed the underlying position, as also reflected in the memorandum of the plaintiff, in regard to the significance of the Elfbrandt and statute cases and their effect upon Gerende.

If Your Honors have no further questions on the actual effect, of the actual vitality of Gerende, shall I proceed to the other points that we raise?

Judge Sobeloff: Yes.

Mr. Rosen: Our other points that we would have you pass upon, they are the subsidiary points in the case.

Judge Sobeloff: Go on.

Mr. Rosen: If I may diverge there for just one moment, may I suggest that on the point of our position that the Attorney General cannot by himself revise this oath after the Court of Appeals of Maryland placed its gloss upon it, which gloss has been interpreted by the Supreme Court of the United States; and I refer the Court to the concurring opinion of Mr. Justice Frankfurter in the Garner case, which is reported in 341 U.S. 716 at page 727. Justice Frankfurter says:

"The Attorney General did not give this assurance"—that is in Gerende—"as a matter of personal relaxation of a legal requirement. He was able to give it on the basis [fol. 87] of the interpretation that the Court of Appeals

of Maryland, the highest Court of that State, had placed upon the legislation."

As to the remaining points that plaintiff raises in his complaint and his supporting memorandum, first I would like to say that it is true that we have decided not to press the point of the plaintiff's particular religious beliefs. However, in our basic argument on the First Amendment rights and general rights, freedom of association and speech, conscience and the like, we do make the point that oaths of this sort when required to cross the board conditioned upon public employment are unconstitutional under the First Amendment.

In respect to the argument on bill of attainder, our position again is basically reflected in the legal memorandum in support of the complaint.

It is our position fundamentally that loyalty oaths as conditions of public employment, particularly loyalty oaths that go far in invading First Amendment areas are bills of attainder in the light of the Supreme Court's Brown decision. We think that Keyishan, which is before the Supreme Court, is now distinguishable primarily on the ground that in that case there is no loyalty oath any longer required and admission even of membership in a "sub-
[fol. 88] versive organization", is merely prima facie evidence of disqualification, and subject evidently to rebuttal, the same point, the same aspect of the case as most of the other cases that the Supreme Court decided in the last decade pertains to our point that by providing that the oath is an absolute condition for public employment, so that the failure to execute the oath makes one ineligible, violates due process by not providing for a hearing or by shifting the burden of proof on the plaintiff.

As to that, which raises the Speiser decision, quoted extensively by Mr. Murphy, may I suggest to the Court that Speiser still has vitality in the area of loyalty oaths.

Justice Douglas in his decision in Elfbrandt specifically stated that the result that was reached in Elfbrandt was

compelled a fortiori by Speiser. I believe that is on page 19 of 384 U.S.

Our basic position, if I may recapitulate, Your Honors, is that the oath now required must be read in the context with its statutory gloss, which by the way is provided by the highest Court of the State of Maryland, which is moderately confusing, and as so read has to fall as being unduly vague and broad; and that Gerende does not avoid this required decision because of the Supreme Court's recent determinations in Elfbrandt and in Baggett and Bullitt and in Cramp.

[fol. 89] Judge Winter: But does that get us anywhere if you do not prevail on the basic attack on Gerende because assume that we say as a matter of a reasonable man looking at this certification that we are bound to read the statute or that we should read the statute and will read the statute, and that reading the statute cannot legitimately sign a part of this oath because the statute is unconstitutionally vague and is broad?

In the light of the severability clause would not the most relief that you would be entitled to to have us enjoin the State of Maryland from requiring the aspects of the certification which are in violation of the Supreme Court decisions?

Mr. Rosen: No, I do not think so, Your Honor.

Judge Winter: Why should the whole statutory scheme fall if the part which the State presently asks for is valid?

Mr. Rosen: Because the statutory scheme is keyed into the definitional provisions which the Supreme Court in Gerende implied had received this gloss by the Court of Appeals of Maryland.

Now, in Dombrowski the Supreme Court held, and of course this involved a prosecution under a similar provision.

Judge Winter: Well, an injunction to restrain the prose-

[fol. 90] cution.

Mr. Rosen: In Dombrowski the Supreme Court held that the three-judge court should issue the injunction

against the statute, that is the enforcement of the law, subject to maintaining jurisdiction if necessary so that if the State Court at some future date clarified the Act in some way or another that the injunction issued by the three-judge court could then be modified.

But our position is that absent any such action by the State Court that this whole statute stands together through the definitional provisions which under Elfbrandt and Baggett are no longer any good.

Judge Winter: Except that it would be the duty of this Court as well as the duty of the State Courts to enforce the federal constitution if we found certain aspects of the oath as set forth in the statute, now not as demanded of this plaintiff, but as set forth in the statute to be invalid, wouldn't it be our obligation to call them invalid?

Mr. Rosen: The oath?

Judge Winter: Yes.

Mr. Rosen: Yes, sir.

Judge Winter: Well, why shouldn't we pick out the parts that are invalid and leave those which are valid?

Mr. Rosen: Because it is our position that they can't, our ultimate position is that they can't really be sepa-
[fol. 91] rated out in the area of a loyalty oath.

Judge Winter: You do not render the position of the Special Assistant Attorney General nugatory. He still would have some duties under the Act. True they may not be as broad as the Act originally contemplated; but where the legislature in one of the most elaborately phrased and carefully phrased severability clauses says "that even if a word or a phrase of this is unconstitutional and the balance can mean something, why, we want it separated."

Mr. Rosen: Well, the Court in the Heubech case, the case that we cited, bares some light on the Court of Appeals of Maryland view of the severability, and there they were faced again with a very well drafted severability clause and concluded that if a provision that was essential to the scheme fell and was closely interrelated with the

other provisions the whole Act would have to fall, and it is our basic position that the defmitional provisions, which we do reach as a result of Mr. Whitehill's stand to challenge the loyalty oath, are bad, and that this Court in the light of Dombrowski is not in a position to rewrite it for the State of Maryland, that this definitional provision has to fall, and until some subsequent action of the State of Maryland, the whole statute has to be enjoined.

Judge Winter: I see. Thank you.

Mr. Rosen: Thank you.

[fol. 92] Judge Sobeloff: Anything further from your side?

Mr. Weiner: No, sir.

Judge Sobeloff: All right, Mr. Murphy.

Mr. Murphy: Your Honor, we would point out that Exhibit A-1 in the complaint or the petition, which sets forth the certification of applicant for public employment, which he was asked to sign, and it does state "Required by law (Art. 85 A, Paragraph 13, Annotated Code of Maryland, 1957), at the University of Maryland, and it calls for that specific certification.

The University is an autonomous unit, and the certifications which are actually in use throughout the State, other than the University, do not contain that requirement. This pledge here is what is basically being used everywhere excepting Berkeley. I do not think it makes any differenee, but I would like to draw the Court's attention to the fact that—

Judge Sobeloff: All right.

Judge Winter: I am not quite sure I understand what you are saying.

Mr. Murphy: Well, perhaps I could show Your Honors ones that are actually in use.

[fol. 93] Judge Sobeloff: All right.

Judge Winter: Exhibit A-1 is entitled "Certification of applicant for public employment."

Mr. Murphy: Yes, sir.

Judge Winter: Now, you say this is the one which the University of Maryland used.

Mr. Murphy: Apparently it is, yes. The only difference between that and the one that is in use, and that I have just showed you, is that it does not have "Required by Article 85 A, Section 13."

It is a trivial difference, but I thought I ought to point out to the Court that that it is basically the same as the one I showed you. The language is the same in both with the exception of that difference.

Judge Winter: Of course, the fact of the matter is, and I do not want to be technical about it, is that this subtitle of the University of Maryland form does not refer you to anything because it says, "Article 85 A, Paragraph 13, Annotated Code of Maryland."

It is not a paragraph; it is a section.

Mr. Murphy: I assure you we did not write that form.

Judge Winter: I hope you did not.

Mr. Murphy: The contention that the Attorney General has not revised or does not have the power to revise it [fol. 94] and we did not revise it this was done by the Court, and it is the construction that this Court is faced with, and the loyalty pledge is based on that construction, and requires only a disavowal of a particular and specific type of activity, which I believe everyone will agree is very inimical to the public interest.

Judge Sobeloff: All right.

Mr. Weiner: Your Honor, as Judge Winter points out, the oath in question here, or the card in question here which Mr. Whitehill was asked to sign, states on its face that it is required by a law, and then it miscites the law, or it cites some nonexistent section, and if I read Mr. Murphy's brief correctly the State is taking the point that Section 13 of the Act may not even be the proper section and perhaps this oath is really required by Section 11.

But doesn't all that really point out the basic vagueness of all of the basic materials in this area? And doesn't that really point out that even what Elfbrandt itself, even what Gerende itself had originally said is not really clear to everyone?

Judge Winter at the very beginning of Mr. Murphy's argument had asked about what were the oaths that were used by the states up until the time of the Elfbrandt decision.

I think Judge Sobeloff mentioned that, "Well, maybe [fol. 95] perhaps that is really not relevant."

But to the extent that it is relevant, and in answer to Judge Winter's inquiry we have a complete set of the various oaths, or not a complete set, but a set of the various oaths that were used throughout the states after Gerende, some showing that they are 1963 forms, and some a little earlier, which cover the entire spectrum of loyalty oaths, some include the entire statutory definition. Some are more limited, and in some instances some are as limited as Gerende itself had said.

Judge Winter: Well, they were prepared by a whole battery of lawyers.

Mr. Weiner: A whole battery of lawyers, yes, sir.

Judge Winter: By counsel for the County Commissioners, the City Solicitor of Baltimore, the Special Assistant to the Attorney General, the Special Assistant to the University of Maryland, et cetera.

Mr. Weiner: All of whom we might presume are reasonable men; and yet every one of these people, responsible public officials, were reading Gerende differently.

The three-judge court in Baggett and Bullitt, before it came to the Supreme Court cited Shub and construed the Washington section there in the very same manner as the [fol. 96] Maryland Court of Appeals had construed the Maryland statute, which as Mr. Murphy concedes is the identical section.

So that really in that case the lower court, or the court just before the Supreme Court, had tried to do the same thing through the statute that the Maryland Court of Appeals had tried to do to the same statute here.

And yet when it came up to the Supreme Court, the Supreme Court read it and says, "We can't really understand what it means; it is vague."

It was a dissenter, it would appear from the opinion, who first pointed to Gerende and who lamented that Gerende was dead; and footnote 7 of Baggett and Bullitt would seem to be a reply to the dissent, and isn't it really a language problem where the Court had to omit the language of "in one way or another," when the Court began its "of what the Gerende oath was in the Baggett and Bullitt footnote they very carefully began the footnote by leaving out 'in one way or another.'"

Now, if "in one way or another" added anything or was of any significance is there any reason why it should have been left out?

And if Mr. Murphy is reasonable and can read "in one way or another," the way he does, what assurance is there that state prosecutors would read "in one way or another" [fol. 97] the identical way that Mr. Murphy does?

Certainly the state public officials who drafted these various oaths after Gerende read it differently than the Attorney General did. And do not the cases say in Cramp and those that followed that prosecutors too are human, and isn't that one of the dangers that vagueness, that the entire vagueness approach seems to be aimed at avoiding? Finally, if Gerende really retains all its vitality, why was it that the State right after or so soon after the decision in Elfbrandt chopped out a good part of it?

Judge Winter: Well, you heard them say because they are cautious lawyers.

Mr. Weiner: Well, I think they also said that they also see that mere knowing membership is clearly not something that the State can bar, t' at the State should bar.

I would respectfully submit to Your Honors that particularly in view of the "in one way or another", which has never been defined—

Judge Sobeloff: Not defined but adopted apparently by the Supreme Court in Gerende.

Mr. Weiner: Yes, yes, sir; but the Supreme Court in Gerende adopted a number of things which it does not

want to adopt any more and carefully deleted from Baggett and Bullitt.

[fol. 98] Judge Thomsen: Well, if they deleted it, isn't that an argument the other way? That they thought it was unimportant one way or the other. You do not accuse them of dishonesty in their footnote, do you?

Mr. Weiner: Oh, no.

Judge Thomsen: It evidently indicates that they did not think that those words were necessary to quote because it was attempting to state the facts.

Mr. Weiner: Doesn't it just as easily indicate that they are misleading?

Judge Thomsen: No.

Mr. Weiner: And in footnote 7 wasn't the Court trying to say, "We did not reach the statute?" At least that is the way—"We did not reach the Maryland statute in Gerende."

Judge Sobeloff: Why did not Mr. Justice Douglas make clear his position if he disagreed with that footnote?

Mr. Weiner: Why did not Justice Douglas?

Judge Sobeloff: Yes, in Elfbrandt.

Mr. Weiner: Of course, there are many reasons why a Justice will dissent or will not dissent; and the mere fact that they do not dissent or articulate their disagreement does not necessarily mean that they are in complete agreement with everything in that respect. I certainly hope [fol. 99] he does not, but that is our position, and I think Professor Rosen summarized it.

Judge Sobeloff: All right, gentlemen. Anything further?

Mr. Murphy: No, Your Honors.

Judge Sobeloff: The Court will adjourn. Thank you very much.

(Thereupon, at 11:10 o'clock a.m. the Court adjourned.)

Certified to be a true and correct transcript of the proceedings in the above case.

Rose M. Elgin, Official Reporter.

Francis T. Owens, Official Reporter.

[fol. 100]

July 11, 1966

Charles D. Murphy, Ph.D., Head
Department of English
College of Arts and Sciences
The University of Maryland
College Park, Maryland 20742

Dear Dr. Murphy:

I owe you an apology for passing so lightly over the loyalty oath question during our interview in your office. A lot of thought since that interview has persuaded me, however reluctantly, that this is not a matter to be taken lightly.

Everyone seems to agree that the loyalty oath law is a bad law. A bad law can be pulled down only if someone challenges it. But who will challenge it if to do so cuts off his livelihood and arrests his professional climb? Hardly anyone. Baby needs shoes.

These days it is very rare for an individual to find himself the pivot point in a major social matter, but it has just happened to me. Three radials have met at a point:

1. The University of Maryland, a State-supported institution, has firmly and unequivocally invited me to teach there.
2. I don't need the money.
3. As a Quaker, I am utterly opposed to oaths, whether or not they are disguised by weasel words like 'affirm' or 'certify,' that impute a common dishonesty which can only be lifted by writing your name.

Since circumstance has put me in a useful place, I must act usefully or regret it the rest of my life.

Therefore, I must decline to sign the "Certification of Applicant for Public Employment."

If you would like to hear them, there are several other [fol. 101] reasons I think are cogent for refusing to join in this charade.

Loyalty oaths belong less in the province of law than in that of pathology; they are a state's expression of its paranoia.

It is evident to all but the most childish minds that a serious, dedicated subversive would sign any such oath instantly, and take his chances with a perjury charge later.

A ridiculous law of a State reflects the light of ridicule over all the laws of the State.

In a free society (and in one like ours that is trying hard that way), it is the State's task to prove guilt, not the individual's to prove his innocence.

Now, coming to practical matters and the course of events:

Since I am by your letter evidently quite well qualified to teach, and am needed to teach, then if I am refused employment I can only consider such refusal a discrimination against me for my creed by the University and by the State. Upon notice in the form of a letter of refusal, or my non-receipt of my copy of the contract, I shall immediately begin suit against the University, the State, or both, in purpose to strike down this foolish law.

I think you and I will agree that this whole affair should neither color nor contaminate the workings of your Department. I'd like to keep the teaching and the legalistics in separate boxes. Therefore, if I am formally refused employment, and I have no pay or standing, it makes no difference to me; I'll still be there all day every Tuesday, doing the job that wants doing. In the unlikely event that I should lose my suit, I'll have had the privilege of working with you and the students, and you'll not have had an unexpected vacancy in the curriculum.

Reciprocal courtesy in this suggests quiet; other than my own file copy of this letter, there are two carbon copies. One goes today to the Reverend Irving R. Murray, Charles and Franklin Streets, Baltimore, Maryland 21201, telephone ID 5-4141. The Reverend Murray, as you doubtless [fol. 102] know, is head of the Maryland branch of the American Civil Liberties Union.

The other copy goes today to Dr. Carl Bode for his interest as the matters in it affect the American Association of University Professors.

Both these men are on caution to be silent until either the State or the University has moved. My immediate family have been apprised, but no one else. The press will receive no information until counsel so approves.

If I were given to levity in grave moments, which I am, I'd say, "Sorry about that, Chief!"

And I am.

But I'm not, really.

The best to you, as always,

JOSEPH WHITEHILL

[fol. 103]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil Action No. 17564

HOWARD JOSEPH WHITEHILL, JR., Plaintiff,

vs.

WILSON ELKINS, President, University of Maryland, BOARD OF REGENTS, University of Maryland, J. JEROME FRAMPTON, JR., President, State Board of Education, Defendants.

OPINION—Filed September 8, 1966

Before: Sobeloff and Winter, Circuit Judges, and Thomsen, Chief Judge.

Sanford Jay Rosen, Esq., Arnold M. Weiner, Esq., Mrs. Elsbeth Levy Bothe, and Joseph S. Kaufman, Esq., Attorneys for Plaintiff.

Thomas B. Finan, Esq., Attorney General of Maryland, Robert C. Murphy, Esq., Deputy Attorney General of Maryland, Loring E. Hawes, Esq., and Julius A. Romano, Esq., Assistant Attorneys General of Maryland, Attorneys for Defendants.

WINTER, Circuit Judge:

This action, brought under the Civil Rights Act, 42 U.S.C.A. § 1983, and invoking the civil rights and declaratory judgment jurisdiction of this Court, 28 U.S.C.A. §§ 1343(3), 2201 and 2202, seeks to enjoin the oath requirements of the Maryland Subversive Activities Act of 1949, 8A Annotated [fol. 104] Code of Maryland (1964 Ed.), Article 85A, §§ 1, *et seq.*, exacted of public employees as a condition precedent to public employment. Defendants' motion to dismiss admits the facts well pleaded, which are as follows:

Plaintiff is a member of the faculty of The Johns Hopkins University, teaching creative writing, an author, and a practicing member of the religious organization known as the Society of Friends. Plaintiff was engaged as a visiting lecturer in English at the University of Maryland, College Park, Maryland, for the academic year of 1966-1967. In July, 1966, a formal contract embodying the conditions of his employment was forwarded to plaintiff. He was also forwarded a document entitled "Certification of Applicant for Public Employment," which contained a loyalty oath.[1] Plaintiff was advised that he must sign it as a condition precedent to his employment. Plaintiff executed his employment contract, but declined to execute the loyalty oath. He was immediately advised by an authorized representative of the University of Maryland that that educational [fol. 105] institution would not accept his services without the loyalty oath first having been executed by him. Plaintiff declined to sign this oath and has now brought this suit, seeking a declaration that the oath sought to be exacted from him was unconstitutional and seeking to enjoin defendants from preventing the consummation of his contract with the University of Maryland because of his failure to execute the oath.[2] Pursuant to prayer in the complaint,

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[1] While this opinion uses the popular parlance "oath," technically plaintiff was required to make a written statement of his loyalty, under the penalties of perjury prescribed by 3 Annotated Code of Maryland (1957 Ed.), Art. 27, § 439. The document itself was entitled "Certification of Applicant for Public Employment" and the operative words were "I, _____ do hereby certify * * * ." Article 39 of the Maryland Declaration of Rights guarantees the right of any person to affirm, rather than swear, agreeably to his religious beliefs, and 1 Annotated Code of Maryland (1957 Ed.), Article 1, § 9 implements this guarantee.

[2] Included among the defendants is J. Jerome Frampton, Jr., president of the Maryland State Board of Education. This board has no power with regard to the University of Maryland, the government of which is vested in its Board of Regents. 7 Annotated Code of Maryland (1965 Ed.), Article 77 § 249(e). The motion to dismiss will be granted as to this defendant for improper joinder.

a statutory three-judge court was immediately convened, 28 U.S.C.A. §§ 2281 and 2284, and the case heard as promptly as possible, inasmuch as plaintiff's employment was to begin September 19, 1966.

The oath sought to be exacted from plaintiff is as follows:

> "CERTIFICATION OF APPLICANT FOR PUBLIC EMPLOYMENT Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)
>
> "I, ... do
> (Print Name—including middle initial),
> hereby certify that I am not engaged in one way or another in the attempt to overthrow the Government of the United States, or the State of Maryland, or any political subdivision of either of them, by force or violence.
>
> "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury [fol. 106] prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)."
>
> Date .....
>
> Signature .....
> (Name—including middle initial)

In his complaint plaintiff alleges that the loyalty oath is unconstitutional, because it infringes on his First and Fourteenth Amendment rights, is so vague as to deny him due process, and equal protection of the laws, and constitutes a bill of attainder against him. Additionally, plaintiff obliquely alleged that the oath would deny him freedom of religion, but in argument plaintiff made no contention that any specific religious belief held by him was counter to the certification that he was asked to make.

Article 85A of the Annotated Code of Maryland was enacted in its entirety in 1949 and has never been amended. Of the provisions pertinent to this case, § 10 renders ineligible for employment by the state any person who is a

"subversive" person as defined in this Article. Section 13 required state employees who were such on June 1, 1949, the effective date of the Act, to make a written statement, subject to the penalties of perjury, that he or she was not a "subversive" person as defined in Article 85A, and § 11 requires every department, board, commission or other agency of the State of Maryland or any political subdivision thereof in the appointment of new employees, to establish procedures, by rules, regulations or otherwise, to ascertain that any employee "including teachers and other employees of any public educational institution in this state" is not a [fol. 107] "subversive" person as defined in the Article. The Attorney General of Maryland, in reliance upon these sections, has expressed the view that persons rendering occasional instructional services to the University of Maryland as part of the formal instruction program are required to execute the loyalty oath pledge. 45 Opinions Attorney General 187 (1960).

The operative words "subversive person" are defined by § 1, which reads:

> "'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of subversive organization or a foreign subversive organization."

Because one is a "subversive person" if he is a member of a "subversive organization" or a "foreign subversive organization," the definitions of those terms, as set forth in § 1 of Article 85A, should also be stated. They are:

"'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence.

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy [fol. 108] or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of, the United States, or of the State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means."

While plaintiff asserts a denial of his First and Fourteenth Amendment rights to freedom of speech and freedom of association as well as equal protection of the laws, the first substantive issue we must decide is whether the oath is so broad, vague and indefinite that plaintiff has been denied due process of law. This is so because plaintiff's First and Fourteenth Amendment rights are not violated if the oath is valid under the due process clause; they have been violated only if the oath will not withstand the due

process test. *Baggett* v. *Bullitt*, 377 U. S. 360 (1960); *Elfbrandt* v. *Russell*, 384 U. S. 11 (1966).[3] Of course, the pres- [fol. 109] ence of First and Fourteenth Amendment rights buttresses the strictness of the due process requirement. We turn first to whether the oath is so broad, vague and indefinite as to deny due process of law.

The validity of Article 85A under state and federal law was sustained in the state courts in *Shub* v. *Simpson*, 197 Md. 282, 76 A.2d 332 (1950); *Hammond* v. *Lancaster*, 194 Md. 462, 71 A.2d 474 (1950); and *Hammond* v. *Frankfeld*, 194 Md. 487, 71 A.2d 482 (1950). One of the parties in the *Shub* case sought further review in the Supreme Court of the United States, *Gerende* v. *Bd. of Supervisors of Elections*, 341 U. S. 56 (1951). Technically, the oath found to be valid in the *Gerende* case was the oath required of candidates for election by § 15 of Article 85A, while the oath to which plaintiff objects is the oath required by §§ 11 and 13 of Article 85A of state employees and appointed officers,

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[3] In the *Elfbrandt* case, the Arizona loyalty oath was held invalid because of its indefiniteness, i.e., its failure to require specific intent to subscribe to the unlawful ends of a subversive organization by one who has become a member thereof. The relationship between First and Fourteenth Amendment rights, on the one hand, and the due process requirement of definiteness, on the other, is demonstrated by the following extracts from the Court's opinion:

> "This Act threatens the cherished freedom of association protected by the First Amendment, made applicable to the states through the Fourteenth Amendment. (* * * citing).
>
> * * * *
>
> "'A statute touching those protected rights must be narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state.' Cantwell v. Connecticut, 310 U. S. 296, 311 * * *. Legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' * * *
>
> "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. * * *". *Id.* at pp. 18-19.

[fol. 110] but, since the oaths are identical in both situations, what the Supreme Court said in the *Gerende* case is determinative here. The Court affirmed the decision of the Maryland Court of Appeals in *Shub* v. *Simpson, supra*, saying;

> "We read this decision to hold that to obtain a place on a Maryland ballot a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence,*' and that he is not knowingly a member of an organization engaged in such an attempt. —— Md. ——, at ——, 76 A.2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is affirmed." *Id.* at 56-57.

Thus, the Supreme Court in *Gerende* specifically approved of an oath that one is "not a person who is engaged in one way or another in the attempt to overthrow the government by force or violence," and that "he is not knowingly a member of an organization engaged in such an attempt." The oath in the case at bar is precisely in the form upheld by the Supreme Court, except that it eliminates the part of the oath that he who makes it also certifies that he is "not knowingly a member of an organization engaged in such an attempt [overthrow of the government by force or violence]." In argument we were told that the latter certification was eliminated from the form of oath at the instance of the Attorney General on May 3, 1966, following the decision in *Elfbrandt* v. *Russell, supra* [decided April 18, 1966]. In the light of this flat holding in *Gerende,* we need only determine whether *Gerende* has been subsequently over-[fol. 111] ruled or modified to decide plaintiff's first conten-

tion. Plaintiff asserts that *Gerende's* authority has been impaired by *Baggett* v. *Bullitt* and *Elfbrandt* v. *Russell, supra.*

In *Baggett* v. *Bullitt, supra,* loyalty oaths of the State of Washington, one applicable to teachers and the other applicable to all state employees, including teachers, were held invalid for vagueness. The oath required of all state employees, including teachers, is the significant oath for the case at bar. It required employees to swear that they were not a "subversive person" which was defined in terms identical to those under Article 85A § 1 to include one who "advocates, abets, advises or teaches by any means" another to commit or aid in the commission of any act intended to overthrow or alter, or to assist the overthrow or alteration of the constitutional form of government by revolution, force or violence. Insofar as a "subversive person" was one who was a member of a "subversive organization," the Washington definition included a limitation, absent in the Maryland definition, that membership be knowing. The Supreme Court held the "advocates, abets, etc." language invalid because it was lacking in terms susceptible of objective measurement and failed to inform what the state commanded or forbade.[4]

[fol. 112] The *Baggett* case is clear authority that if Maryland required an oath in the precise language of the Maryland Subversive Activities Act of 1949, *supra,* such an oath would be invalid. The fact is, however, that the oath sought to be exacted from the plaintiff in the case

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[4] *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961), was relied on to support this result. There Florida required state employees, including teachers, to make oath that they, *inter alia,* had not lent "aid, support, advice, counsel or influence to the Communist Party." 368 U. S. at p. 279. The oath was held invalid because lacking in terms susceptible of objective measurement. In so deciding, the Court commented on the absence of language proscribing "advocacy of violent overthrow of state or federal government" and "membership or affiliation with the Communist Party, past or present." 368 U. S. at p. 286.

at bar is less than that condemned in *Baggett* and, indeed, less than that approved in *Gerende*. While the dissenters in *Baggett* v. *Bullitt* expressed the view that *Gerende* had been overruled by the decision in *Baggett*, explaining the reasons for this conclusion in a footnote,[5] the majority answered by footnote that *Gerende* was still good law.[6] In view of the statement by the majority we cannot [fol. 113] read *Baggett* v. *Bullitt* as adversely affecting the portion of the holding in *Gerende* which approved the oath sought to be required of the plaintiff.

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[5] "It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in Gerende, but a review of the record in that case conclusively demonstrates to the contrary. Further, while the Gerende opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague." *Id.* at p. 382.

[6] "The contention that the Court found no constitutional difficulties with identical definitions of subversive person and subversive organizations in Gerende v. Board of Supervisors, 341 US 56, 95 L ed 745, 71 S Ct 565, is without merit. It was forcefully argued in Gerende that candidates for state office in Maryland were required to take an oath incorporating a section of the Maryland statutes defining subversive person and organization in the identical terms challenged herein. But the Court rejected this interpretation of Maryland law and did not pass upon or approve the definitions of subversive person and organization contained in the Maryland statutes. Instead it made very clear that the judgment below was affirmed solely on the basis that the actual oath to be imposed under Maryland law requires one to swear that he is not a person who is engaged 'in the attempt to overthrow the government *by force or violence*,' and that he is not knowingly a member of an organization engaged in such an attempt.' Id., at 56-57, 95 L ed at 746 (emphasis in original). The Court said: "At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirement. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is Affirmed. Id. at 57, 95 L ed at 746." *Id.* at p. 368.

In *Elfbrandt* v. *Russell, supra,* the Arizona loyalty oath was held invalid. The language of the oath[7] as such did not appear to violate any constitutional fiat, but the legis- [fol. 114] lature put a gloss on the oath by subjecting to a prosecution for perjury and for discharge from public office anyone who took the oath and who "knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations," or "any other organization," having for one of its purposes the overthrow of the government of Arizona by force or violence, where the employee had knowledge of the unlawful purpose. The failure of the statutory gloss to require further that the prosecution and expulsion be conditioned upon a showing that the employee was an active member *with the specific intent of assisting in achieving the unlawful ends of an organization which had as one of its purposes the violent overthrow of the government* rendered the gloss invalid.

The decision is, of course, ample justification for the Attorney General of Maryland to have eliminated the portion of the Maryland oath approved in *Gerende* that a person is not knowingly a member of a subversive organization, and to that extent overruled the decision in *Gerende.* The majority opinion makes no mention of *Gerende,* but we cannot read *Elfbrandt* as overruling *Gerende* to any greater extent, notwithstanding the inability of the dissenters to square the holding with the holding in *Gerende* and other cases. In short, in both of the decisions rendered after *Gerende* which have been pressed on us by plaintiff, we cannot find that the portion of the holding in *Gerende* which permits an oath that a person is not en-

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[7] "I, (type or print name), do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so held me God (or so I do affirm)."

gaged in one way or another in the attempt to overthrow the government by force or violence has been impaired. [fol. 115] Plaintiff argues that "in one way or another" is a phrase unconstitutionally vague, while defendants argue that "in one way or another" means "any way" and is linked to the word "attempt," so as to express the concept of specific intent, coupled with an overt act, to overthrow the government by force or violence. We need not choose between these arguments. It suffices to say that the phrase "in one way or another" was specifically approved in *Gerende;* we cannot find that it has been overruled; and it is our duty to apply the rules laid down by the Supreme Court and not to anticipate its possible future decisions.

Plaintiff also argues that the oath sought to be exacted from him is not limited to the text stated in the opinion but, rather, extends to the full oath purportedly required by Article 85A. Alternatively, plaintiff argues that the Attorney General of Maryland is without authority to require only a portion of the oath required by Article 85A, but not all. The first portion of the argument rests upon the assertion that, in the certificate plaintiff was asked to execute, the reference to "Art. 85A, paragraph 13, Annotated Code of Maryland 1957" after the phrase "Required by law" means that the certification following, which, on its face, is limited to engaging in one way or another in the attempt to overthrow the government by force or violence, embodies aspects of the oath prescribed by statute which are clearly invalid under the Supreme Court decisions. We are not persuaded. The other portion of the argument rests in part on *Dombrowski* v. [fol. 116] *Pfister,* 380 U. S. 479 (1965), which is cited as indicating that only a state court of the State of Maryland may properly determine whether the full oath prescribed by Article 85A can be severed into its valid and invalid provisions, and that it is our duty to enjoin the oath in its entirety until a state court renders an appropriate

judgment. This argument overlooks § 18 of Article 85A,[8] as clear an expression of severability as could be found. Moreover, as the chief legal officer of the State of Maryland, sworn to uphold the Constitution of the United States, as well as the Constitution and laws of the State of Maryland, Md. Constitution, Article 1, § 6, the Attorney General acted properly within the scope of his authority in advising that those portions of the oath prescribed by Article 85A repugnant to decided cases of the Supreme Court of the United States should not be required of state employees, even in the absence of a specific court decree. We do not read the *Dombrowski* case as proscribing this conduct.

We consider next plaintiff's argument that the oath is a bill of attainder and conclude that this contention is without merit. Loyalty oaths, as conditions precedent for [fol. 117] public employment, if otherwise valid, are not invalid as bills of attainder. *Garner* v. *Board of Public Works*, 341 U. S. 716, 722 (1951), held an oath of non-advocacy of violent overthrow of government required of municipal employees not punishment and hence not a bill of attainder. Even *Baggett* v. *Bullitt, supra,* which condemned a loyalty oath as unconstitutionally vague, recognized the right to a state " * * * to take proper measures safeguarding the public service from disloyal conduct" (p. 379). See also, *American Communications Ass'n* v. *Douds*, 339 U. S. 382 (1950); *Adler* v. *Board of Education*, 342 U. S. 485 (1952); and *Keyishian* v. *Board of Regents*, —— F. S. —— (W.D. N.Y. 1966), prob. jur. noted, 384 U. S. 998 (1966). *Speicer* v. *Randall*, 357 U. S. 513 (1958),

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[8] "18. Severability.

"If any provision, phrase, or clause of this article or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions, phrases or clauses or applications of this article which can be given effect without the invalid provision, phrase, or clause or application, and to this end the provisions, phrases and clauses of this article are declared to be severable."

is not to the contrary as the discussion of that case in *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 53-56 (1961), demonstrates.

Under existing law, we do not find the oath tendered to plaintiff invalid. We conclude that the complaint should be dismissed. The Clerk will enter an order to that effect.

(See separate concurrence), United States Circuit Judge;

Harrison L. Winter, United States Circuit Judge;

Roszel C. Thomsen, Chief Judge, United States District Court for the District of Maryland.

[fol. 118] SOBELOFF, Circuit Judge, concurring:

In joining my brethren in the disposition of this case I wish to add a brief statement of my reasons.

Whether the ritual of an oath or affirmation of loyalty, with or without sanctions for perjury, is a wise or effective means to the unquestionably legitimate end of protecting the state against subversion is not the issue before us. The question is the legality of the particular requirement demanded of the plaintiff, not its desirability.

I am inclined to agree with the plaintiff that the prescribed oath or statement is not to be judged in isolation, but in conjunction with the statute, for in the absence of a statute, there would be no authority for demanding any statement "under penalty of perjury." If it were not for *Gerende* v. *Board of Supervisors*, 341 U.S. 56 (1951), I would not lightly dismiss the plaintiff's argument that the reference to Article 85A, with its language about "subversive persons" and "subversive organizations," has a material bearing on the question before us, even though the oath itself does not expressly embody these terms. But the question comes to us freighted with a history, and the role of the statute in respect to the oath has been authoritatively interpreted.

In *Gerende* the Court upheld an oath which was in terms more comprehensive than the one before us. The Court embraced what it regarded as a restrictive interpretation of the Ober Law by the Maryland Court of Appeals, and [fol. 119] upon that premise, and upon the condition that the Attorney General would advise the state authorities to accept as sufficient an affidavit in the narrow terms stipulated by the court, sustained the statute and the affidavit pursuant thereto. Whatever we might otherwise have thought, the Supreme Court has authoritatively decided that the broader language of the statute, which concededly would make it invalid, see *Baggett* v. *Bullitt,* 377 U.S. 360 (1964), is not controlling, but the less comprehensive language of the oath, as directed by the Attorney General, governs.

The plaintiff maintains first that the Supreme Court was mistaken in its analysis of the decision of the Maryland Court of Appeals in *Shub* v. *Simpson,* 196 Md. 177, 76 A.2d 332 (1950), and he further points to the logic employed in the later holdings in *Baggett* v. *Bullitt, supra,* and *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966), in support of his thesis that the Court must sooner or later disavow *Gerende.*

I acknowledge the force of the plaintiff's arguments as to the doubts concerning the present status of *Gerende* created by the recent decisions of the Supreme Court.[1] It [fol. 120] may well be that on renewed consideration the Supreme Court would today hold the statute and the oath, even as recently further modified by the Attorney General, too vague to meet constitutional standards. However, it is one thing for a lower court to project an estimate

[1] Keyishian v. Board of Regents, —— F. Supp. —— (W.D. N.Y. Jan. 5, 1966), prob. juris. noted, 384 U.S. 998 (1966), decided prior to the Supreme Court's decision in *Elfbrandt,* may be distinguishable from the case at bar. There is no New York equivalent to the "loyalty pledge" subject to penalties for perjury, that is before us today. Furthermore, as the three-judge district court emphasized, New York State, in requiring of a prospective employee the assurance that he has complied with the laws under attack in *Keyishian,* affords the applicant an opportunity to be heard, should he be in doubt as to the coverage of the statutes.

of the future course of Supreme Court decisions on a point not theretofore specifically ruled upon; it is quite another to assume that an earlier decision of the Supreme Court on the very question now pending before the inferior tribunal has been overruled *sub silentio*. Judicial discipline requires that such assumptions be not too freely made, especially when the Supreme Court seems to have been careful to avoid an outright overruling. If *Gerende* is ripe for final dispatch, the task is for the Supreme Court, not a subordinate court.

Thus, despite the doubts engendered by the course of subsequent adjudications, I think the contentions made by the plaintiff here are more properly addressed to the Supreme Court. I am obliged, therefore, to join in today's order of dismissal rather than anticipate the abandonment of *Gerende*.

SIMON E. SOBELOFF
U. S. Circuit Judge

[fol. 121]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Civil Action No. 17564

HOWARD JOSEPH WHITEHILL, JR., Plaintiff,

vs.

WILSON ELKINS, President, University of Maryland, BOARD OF REGENTS, University of Maryland, J. JEROME FRAMPTON, JR., President, State Board of Education, Defendants.

ORDER—Filed September 8, 1966

Defendants' motion to dismiss having come on for hearing, briefs having been filed, argument having been heard,

and the matter considered, it is, this eighth day of September, 1966, by the *United States District Court for the District of Maryland,*

Ordered that defendants' motion to dismiss be, and it is hereby, granted, and said complaint is dismissed, with costs to defendants.

Simon E. Sobeloff, United States Circuit Judge;
Harrison L. Winter, United States Circuit Judge;
Roszel C. Thomsen, Chief Judge,
United States District Court for the District of Maryland.

[fol. 122]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Civil Action No. 17564

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 13, 1966

I. Notice is hereby given that Howard Joseph Whitehill, Jr., the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint, entered in this action on September 8, 1966.

This appeal is taken pursuant to 28 U.S.C. § 1253.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The Complaint for Preliminary and Permanent Injunction and Declaratory Judgment, filed on August 19, 1966 in this cause.

2. The Application for Convening of a three-Judge Court, filed on August 19, 1966.

[fol. 123] 3. The Motion for Preliminary Injunction, filed on August 19, 1966.

4. The Amendment to the Complaint, filed on August 26, 1966.

5. The Motion to Dismiss, filed on August 31, 1966.

6. The opinion and order of the Court, dated September 8, 1966, dismissing the complaint.

7. The docket sheet in this cause.

8. The transcript of the hearing of September 1, 1966.

9. The letter of July 11, 1966 from Plaintiff, Howard Joseph Whitehill, to Dr. Charles D. Murphy, Ph.D. Head, Department of English, the University of Maryland at College Park, Maryland, introduced at the hearing of September 1, 1966.

10. This notice of Appeal.

III. The following questions are presented by this appeal.

1. Are the "Certification of Applicant for Public Employment" which Plaintiff refused to execute, and the Maryland Subversive Activities Act of 1949, Article 85A, Maryland Code Ann. (1957), which requires its execution as a condition precedent to public employment, unconstitutionally vague, broad and indefinite in violation of due process of law?

2. If the definitional and certification provisions of Article 85A are unconstitutionally vague, broad and indefinite, does the entire statute fall notwithstanding the inclusion in it of a standard severability clause?

3. In the light of recent decisions of the Supreme Court, was the District Court correct in ruling that the certification and statute were insulated from constitutional attack by the Supreme Court's decision in *Gerende* v. *Board of Supervisors of Elections*, 341 U.S. 56 (1951)?

4. Do the "Certification of Applicant for Public Employment" and the statute pursuant to which it is required constitute a bill of attainder in violation in Article I, § 10 of the United States Constitution?

5. Do the Maryland Subversive Activities Act of 1949 and the "Certification of Applicant for Public Employment", required pursuant to it, infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or [fol. 124] subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law?

6. Does Maryland's loyalty "Certification", which is indiscriminately required of all public employees and applicants for public employment, particularly of teachers, unconstitutionally infringe the freedoms of expression, belief, association and academic freedom in violation of the First and Fourteenth Amendments to the United States Constitution?

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Lee M. Miller, 1100 One Charles Center, Baltimore, Maryland 21201, Phone: 752-6100,

Attorneys for Plaintiff-Appellant, Howard Joseph Whitehill, Jr.

[fol. 125] Proof of Service (omitted in printing).

[fol. 126] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 127]

SUPREME COURT OF THE UNITED STATES

No. 754—October Term, 1966

HOWARD JOSEPH WHITEHILL, Appellant,

v.

WILSON ELKINS, President, University of Maryland, et al.

Appeal from the United States District Court for the District of Maryland.

ORDER NOTING PROBABLE JURISDICTION—February 13, 1967

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.